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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RETAIL CLERKS UNION,
LOCALS 770, 137, 905 and 1222,

APPELLANTS,

And

RALPH E. KENNEDY, REGIONAL DIRECTOR
OF THE 21ST REGION OF THE
NATIONAL LABOR RELATIONS BOARD, ETC.,

APPELLANT,

VS.

FOOD EMPLOYERS COUNCIL, INC.,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

BRIEF FOR AMICUS CURIAE JOINT COUNCIL OF
TEAMSTERS NO. 42


FILED

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1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT

3 NO. 20201

4
5 RETAIL CLERKS UNION,
6 LOCALS 770, 137, 905 and 1222,

7 Appellants,

8 AND

9 RALPH E. KENNEDY, REGIONAL DIRECTOR
10 OF THE 21ST REGION OF THE
11 NATIONAL LABOR RELATIONS BOARD, ETC.,

12 Appellant,

13 VS.

14 FOOD EMPLOYERS COUNCIL, INC.,

15 Appellee.

16 ON APPEAL FROM THE UNITED STATES
17 DISTRICT COURT FOR THE SOUTHERN
18 DISTRICT OF CALIFORNIA, CENTRAL DIVISION

19 BRIEF FOR AMICUS CURIAE JOINT COUNCIL
20 OF TEAMSTERS NO. 42

21
22 JURISDICTIONAL STATEMENT

23 This is an appeal by the petitioner below
24 (the Regional Director of the Twenty-First Region of the
25 National Labor Relations Board) [Transcript of Record (T.R.)
26 221], as well as the union respondents [T.R. 222, 224], from

1 an order granting a temporary injunction [T.R. 201].

2 Amicus Curiae Joint Council of Teamsters No.
3 42 was granted permission to appear by order of this Court
4 dated July 2, 1965, as corrected on July 14, 1965.

5
6 STATEMENT OF THE CASE

7 The appellants each contend that the District
8 Court erred in granting an injunction order. In order to
9 properly understand the District Court's ruling, it is
10 necessary to refer to facts and evidence before the Court,
11 some of which has not been set forth in the briefs of the
12 parties.

13 1. The Petition for Injunction- On January 8, 1965,
14 the Regional Director filed a petition for an injunction
15 [T.R. 2] against a number of Retail Clerks unions (Clerks),
16 the Food Employers Council, Inc. (Employers) and a large
17 number of individual food markets who are members of the
18 Employers. This suit was filed pursuant to section 10(1)
19 of the Labor-Management Relations Act (Act) [69 Stat. 149,
20 29 U.S.C. §160(1)]. In his sworn petition, the Regional
21 Director made the following allegations which were either
22 admitted by the respondent Clerks and the Employers, or
23 were found by the Court to be true:

24 a. Charges of unfair labor practices under
25 section 8(e) of the Act were filed with the Board against
26 the Clerks and the Employers on May 7, 1964, by a group of

1 employers and a labor organization [T.R. 3-4, 3(a) and (b);
2 T.R. 206, ¶¶2(a) and (b)] (collectively called the Charging
3 Parties).

4 b. On the basis of the unfair labor practice
5 charges an investigation was conducted by the Regional
6 Director^{1/}, and the results of the investigation provided him
7 with reasonable cause to believe that certain provisions of
8 Article I of the collective bargaining agreement between
9 the Clerks and the Employers violated section 8(e) of the
10 Act [T.R. 13-14, ¶5(j); T.R. 11-12, ¶4(j)].

11 c. In the belief that unless enjoined the
12 Clerks and the Employers would continue to give effect to
13 those provisions of Article I which allegedly violate
14 section 8(e), on June 30, 1964, the Regional Director filed
15 a petition for injunction under section 10(1), entitled
16 Harrington v. Retail Clerks, Civil No. 64-874-PH. On the
17 same date, a stipulation to refrain from unfair labor
18

19 ^{1/} Although it is not alleged that an investigation was
20 conducted, section 10(1) of the Act directs that such an
21 investigation take place before the Regional Director may
22 make an application for injunctive relief, and the pre-
23 sumption is that a government official will perform the
24 duties required of him. See United States v. Washington,
25 233 F.2d 811, 816 (9th Cir. 1956) (presumption that official
26 duty is regularly performed).

1 practices was entered into by the Clerks, the Employers and
2 the Regional Director, and the petition for injunction was
3 accordingly taken off calendar [T.R. 15, ¶6] and subsequently
4 dismissed by the Regional Director [T.R. 15-16, ¶7].

5 d. Notwithstanding the undertakings contained
6 in the stipulation to refrain from unfair labor practices,
7 the Clerks filed a suit against a member of the Employers
8 on November 10, 1964, alleging certain grievances, "and
9 demanded implementation and arbitration of portions of
10 Article I of the Clerks' Agreement . . . as to which in-
11 junctive relief was sought by the Board . . . in Civil No.
12 64-874-PH" [T.R. 16, ¶8; T.R. 216, ¶4(1)].

13 e. By the act of requesting arbitration of
14 the grievances set forth as an exhibit to their suit to
15 compel arbitration, the Clerks entered into, invoked and
16 gave effect to a contract which violated section 8(e) of
17 the Act [T.R. 16-17, ¶9; T.R. 216-17, ¶4(m)].

18 f. Finally, in his prayer for relief the
19 Regional Director asked for the following things:

20 (i) An injunction against the Clerks and
21 the Employers to prevent them from "maintaining, giving
22 effect to, demanding arbitration of, submitting to
23 arbitration, or enforcing Article I, Sections A, B and
24 F(1) and (2)" of the Clerks' agreement, insofar as
25 those sections require the Employers to do or not to
26 do certain things in violation of section 8(e) [T.R. 17

1 ¶1(a)]; and

2 (ii) "[S]uch further and other relief as
3 may be just and proper" [T.R. 19, ¶13].

4 2. The May 10, 1965 Hearing- Between the time of
5 the filing by the Regional Director of the second petition
6 for an injunction on January 8, 1965, and the date of May
7 10, 1965, the petition lay quiescent. This was primarily
8 because the state court suit that had been initiated by the
9 Clerks in which they sought an order directing arbitration,
10 had been voluntarily dismissed [see Reporter's Transcript
11 of Proceedings of May 10, 1965 (hereinafter referred to as
12 "May 10 Trans.") at 31, lines 2-8].

13 Subsequent to the dismissal of the state
14 court action, the Regional Director entered into another
15 stipulation with the Clerks [T.R. 160] whereby the Clerks
16 would be permitted to arbitrate any issue they wished under
17 the clauses that were being attacked before the Board, so
18 long as prior to putting an arbitral award into effect, the
19 Clerks first submitted it to the Regional Director for
20 approval [T.R. 160, 162, ¶1(b)].

21 A hearing was held before the District Court
22 on May 10, 1965, at which the Regional Director^{2/} urged the
23 Court to approve the stipulation [T.R. 163, lines 25-28] and
24

25
26 ^{2/} Acting through his attorney in all of the proceedings.

1 take the injunction proceeding off calendar [T.R. 162, ¶3].
2 The Charging Parties appeared at this hearing, argued both
3 orally and through written briefs, and submitted evidence
4 [Exhibit 2; May 10 Trans. at 16, lines 4-10].

5 a. The Clerks' Newspaper- Included in the
6 evidence presented by the Charging Parties was a union
7 newspaper [Ex. 2] put out by the Clerks.^{3/} In a lead article
8 by Joseph T. DeSilva, the head of one of the Clerks' unions,
9 DeSilva stated that on March 3, 1965, his Union's by-laws
10 were amended to provide "double dues for a six-month period
11 in order to build a war chest. This was done so that we
12 would stand ready to do battle in the event the employers
13 persisted in their refusal to arbitrate" [Ex. 2, p. 1, col.
14 1]. The article then continued, "and as for the 'threatened
15 strike,' let us hasten to point out that it definitely was
16 not a threat--that it very nearly became a reality and is
17 still a possibility. We are not bluffing" [id., col. 2
18 (emphasis in original)].

19 The object of the strike threat, as set forth
20 in the DeSilva article, was this: "Any strategy the Union
21 has employed in this latest dispute has been geared toward
22 making the food employers live up to their word" [ibid.].

23
24 3/ The newspaper stands as an admission against interest.
25 State Farm Mut. Ins. Co. v. Porter, 186 F.2d 834, 843 (9th
26 Cir. 1950) (admission is equivalent to affirmative testimony

1 "[A]rbitration," continues the article, "would not be
2 necessary if the employers would only live up to their word"
3 [id., p. 2, col. 3]. Finally, the article by DeSilva sets
4 forth what the Clerks mean when they say that arbitration
5 would not be necessary if the employers would live up to
6 their word:

7 "[T]he leadership and membership of the Union
8 have lived up to their word.

9 "But this cannot be said about the employers
10 in general.

11 "The most glaring example of this is the
12 employers' failure to deliver wall-to-wall, floor-to-
13 ceiling work to the clerks . . ." [id., p. 3, col. 2
14 (emphasis in original)].

15 The phrase "wall-to-wall, floor-to-ceiling
16 work," has reference to certain provisions in Article I of
17 the Clerks' agreement with the Employers in which the Clerks
18 purport to be recognized as the bargaining representative of
19 "all employees, licensees, lessees, and concessionaires . .
20 . except as limited below, who perform work within food
21 markets . . ." [T.R. 4, lines 25-32].

22 b. Admissions by Counsel- In addition to
23 this documentary evidence, counsel for one group of Clerks'
24 unions acknowledged that the Employers' acquiescence to
25 arbitration was secured through threats of work stoppages
26 [May 10 Trans. at 40, lines 1-8; id., at 42, lines 20-24].

1 c. Basis of Petition- At the conclusion of
2 the hearing on May 10, the Regional Director acknowledged
3 to the Court that the act of arbitrating under a contract
4 deemed to be illegal under section 8(e) of the Act, is it-
5 self illegal conduct under that section:

6 "Your Honor, the second proceeding here [i.e.,
7 the petition filed on January 8, 1965] was instituted
8 on the basis of arbitrating a portion of this contract
9 under attack or the filing of a suit to compel
10 arbitration in the State court, and it was felt that
11 this conduct gave effect to the illegal provision
12 tantamount to reentering the 'hot cargo' clause and
13 for this reason the proceeding was reinstated" [May 10
14 Trans. at 48, lines 10-16 (emphasis added)].

15 The Regional Director informed the Court that
16 "the thrust of the case" filed by him was directed against
17 the alleged illegal clause as well as against "giving it
18 [the clause] effect, by seeking to compel arbitration of it"
19 [May 10 Trans. at 48, line 23, to p. 49, line 1]; however,
20 between the time the suit was filed and the time of the May
21 10 hearing, the Clerks "had convinced the Board that . . .
22 they ought to have the right to arbitrate but without the
23 right to confirm or enforce [an award] until it is passed

24 ////////////////

25 ////////////////

26 //////////

1 upon by the Board" [May 10 Trans at 11, lines 9-13]^{4/}.

2 The District Court thereafter took under sub-
3 mission the question of whether it should approve the
4 stipulation [May 10 Trans. at 50, lines 19-21].

5 3. Memorandum Opinion of May 27- On May 27, 1965, the
6 District Court issued a memorandum opinion on the issue of
7 whether it would approve the stipulation proposed by the
8 Regional Director and the Clerks [T.R. 168].

9 The Court declined to accept the stipulation
10 on the ground that,

11 "if approved, [it] would in effect, place this court's
12 imprimitur on continuance of the arbitration proceeding
13 demanded by the Clerks' Unions. The effort at
14 arbitration is alleged in the Petition to be a vio-
15 lation of the Act, and is specifically asked to be
16 enjoined by Paragraph 1(a) of the prayer of the
17 complaint in this court" [T.R. 168, lines 17-23].

18 The District Court pointed out that at the
19

20 4/ The Regional Director's subsequent remark that the Clerks
21 did not seek to arbitrate illegal portions of the contract
22 [May 10 Trans. at 49, lines 1-3], appears to be a misstate-
23 ment since throughout the hearing it was admittedly the
24 illegal portions of the contract which the Clerks sought to
25 arbitrate, and it was at such an arbitration that the in-
26 junction order was directed.

1 hearing on May 10, the Charging Parties had objected to the
2 stipulation and had presented evidence in documentary form
3 [id., lines 28-31]; and relying in its Memorandum Opinion
4 upon McLeod v. American Fed'n of Television Artists, 234 F.
5 Supp. 832 (S.D.N.Y. 1964), a case which had been cited to
6 the Court by the Regional Director in support of his
7 application for an injunction [T.R. 101-03], the Court
8 ordered a hearing on June 14, 1965 on whether or not an
9 injunction should issue [T.R. 169].

10 4. The Hearing on June 14, 1965- Prior to the June
11 14 hearing, the Regional Director noticed a motion for re-
12 consideration of the Court's decision denying approval of
13 the stipulation [T.R. 170-73]. This motion was heard con-
14 currently with the hearing on what relief, if any, should be
15 granted pursuant to the Regional Director's petition for an
16 injunction. And at the same hearing, the Regional Director
17 moved the Court to certify the matter, pursuant to 28 U.S.C.
18 §1292(b) [sic.], to the Court of Appeals [June 14 Trans. at
19 6, line 24, to p. 7, line 2], to which the District Court
20 replied:

21
22 "Counsel, I do not believe that I can conscientiously
23 make such a certification in view of the allegations in
24 your complaint" [June 14 Trans. at 7, lines 9-11].

25 The Regional Director then acknowledged that
26 "it is true that the complaint and the petition does pray

1 for relief against the proceeding to arbitration" [id., lines
2 23-25], following which the Court and the Regional Director
3 had this colloquy:

4 "THE COURT: It not only prays for that but it
5 alleges that that is one of the things which violated
6 the Act. In fact, as far as I can see, that is one
7 of the principal reasons for your coming into this
8 court.

9 "MR. PRICE [the attorney for the Regional
0 Director]: That is true, your Honor" [June 14 Trans.
1 at 8, lines 1-5 (emphasis added)].

2 The Regional Director then explained that
3 injunctive relief was not being requested at that time
4 because the Clerks had assured him that they would not give
5 effect to any arbitral award until the Regional Director
6 had approved it [id., lines 5-20].

7 Among the items of additional evidence that
8 were presented to the Court at this hearing was a letter
9 dated March 19, 1965, from DeSilva of Local 770 of the
0 Clerks, to Robert K. Fox of the Employers, setting forth
1 seven items which the Clerks wished to have arbitrated
2 [T.R. 188]. Among the items sought to be arbitrated by the
3 Clerks was item 2: "whether there has been a failure of
4 consideration, nullifying the March 14, 1964 Memorandum
5 Agreement" (i.e., the contract between the Clerks and the
6 Employers which contains the attacked clauses); item 3

1 involved the issue of whether the Employers were "unjustly
2 enriched" as a result of the parties' inability to put the
3 attacked clauses into effect, and as a result of the Clerks
4 having given the Employers lower rates and broader box-boy
5 duties in return for the attacked clause; item 5 involved the
6 issue of whether the Employer had in good faith complied
7 with its contractual commitment to aid in the defense of
8 the attacked clauses; and the last item involved the
9 question of whether the Clerks could strike in return for
0 their inability to put the attacked clauses into effect.

1 The Court's attention was then directed to
2 a juxtaposition of the seven items presently sought to be
3 arbitrated with the items which the Clerks had sought to
4 arbitrate earlier, and which had been the basis of the
5 Regional Director's present request for an injunction [June
6 14 Trans. at 13, line 8 to p. 14, line 7]. (The earlier
7 issues had been set forth in a letter attached as an exhibit
8 to the Clerks' state court suit to compel arbitration; and
9 this suit, as well as the letter exhibit, were in turn ap-
0 pended as exhibits to the Regional Director's petition for
1 an injunction [T.R. 50, 56]. In the Clerks' earlier request
2 for arbitration, their contention was as follows:

3 " [T]he Union contends that if Article I in
4 its entirety is unenforceable, then the contract
5 falls

6 ". . . .

"The Union also contends that if any part of the contract falls, then the Union is free to take economic action" [T.R. 57 (emphasis in original)].)

The Court asked if there was any further evidence to be presented [June 14 Trans. at 50, lines 12-13], and hearing no response the Court granted an injunction [id., lines 14-20].

5. The Objections to the Proposed Order- Findings of fact and conclusions of law were then drawn, which recited that by, among other things, having filed the state court lawsuit [T.R. 216, lines 18-25], the Clerks "entered into, invoked and gave effect to a contract or agreement" violative of section 8(e) [id., lines 26-31]. The proposed order was broadly drawn so as to enjoin any arbitration arising out of Article I of the Clerks' agreement with the Employers, and in particular the seven items set forth in the March 19, 1965 letter [T.R. 204, lines 1-6]. This broad order was drawn by the Board and approved as to form by the Clerks [id., lines 12-26].

The sole objectors to the proposed order were the Charging Parties [T.R. 195], and the sole objection made to the order was that it was

"too broad and inclusive, in that it would prevent arbitration between the Clerks' Local Unions and the food markets with respect, not only to the contract clauses in dispute before the . . . Board, but

also clauses which are not disputed"

[T.R. 195, lines 26-30].

In response to the objections of the Charging Parties, the Court's order nunc pro tunc was issued [T.R. 199], which limited the injunction to those clauses "which are in dispute before the . . . Board."

ARGUMENT

I.

THE DISTRICT COURT HAD THE POWER TO ISSUE

AN INJUNCTION UNDER SECTION 10(1) ONCE A

PETITION WAS FILED BY THE REGIONAL DIRECTOR.

A. The Statutory Scheme.

Prior to 1947, there were no exceptions to the Norris-LaGuardia Act's [47 Stat. 70 (1932), 29 U.S.C. §101] proscription on injunctions against labor organizations in "labor disputes." The Taft-Hartley, or Labor-Management Relations Act [61 Stat. 136 (1947), 29 U.S.C. §141] established jurisdiction in the federal courts for the issuance of injunctions in a number of different cases. One case was to prevent certain payments by employers to employee representatives [§302(e), 29 U.S.C. §186(e)]; another was to enjoin certain national emergency strikes [§208, 29 U.S.C. §178]; and a third exception to Norris-LaGuardia was the injunction that could issue to provide preliminary relief while the Board was determining whether conduct against which charges had been filed was an unfair labor practice

1 [§§10(j), (1), 29 U.S.C. §160(j), (1)].

2 In all of the other Acts of Congress which
3 we have examined, the administrative agency which is given
4 authority to seek injunctive relief has discretion as to
5 whether or not to seek such relief. A list of such Acts is
6 appended to this brief.

7 And in section 10(j) of the Labor-Management
8 Relations Act, this same rule obtains, i.e., "the Board
9 shall have power . . . to petition any district court . . .
0 for appropriate temporary relief or restraining order . . ."
1 [§10(j), 29 U.S.C. §160(j) (emphasis added)].

2 Section 10(1) (under which the petition in
3 this case was filed) is significantly different. Alone
4 among the Congressional enactments that we have examined,
5 section 10(1) denies to the administrative agency any
6 discretion when that agency has "reasonable cause to believe"
7 that a charge that certain types of unfair labor practices
8 are being committed is true. Under this section, such a
9 finding on the part of the Regional Director constitutes a
0 mandate from Congress to "petition any United States district
1 court . . . for appropriate injunctive relief pending the
2 final adjudication of the Board with respect to such matter"
3 [§10(1), 29 U.S.C. §160(1)].

4 The Regional Director is required under
5 section 10(1) to seek an injunction. This section has been
6 described by the Board's Chairman as "the mandatory injunction

1 provision. . . . In essence, it requires us to seek an
2 injunction." Address by Chairman McCulloch, Joint Industrial
3 Relations Conference of Michigan State University, April 19,
4 1962, in 49 L.R.R.M. 74, 81 (1962); accord, Comment,
5 Temporary Injunctive Relief Under Section 10(1) of the Taft-
6 Hartley Act, 111 U. Pa. L. Rev. 460, 463 (1963).

7 The basis for such a description is clear.
8 Where Section 10(j) gives the Regional Director "power" to
9 seek an injunction, section 10(1) states that the Regional
0 Director "shall" seek injunctive relief if he has reasonable
1 cause to believe that there has been a violation of sections
2 8(b)(4)(A), (B), or (C), or section 8(e) or 8(b)(7). Not
3 only does this contrast in language exist between sections
4 10(j) and 10(1), but within section 10(1) itself there appears
5 a distinction: The last sentence of this section gives the
6 Regional Director discretion, "in situations where such
7 relief is appropriate," to seek an injunction against a
8 charged violation of section 8(b)(4)(D), while such dis-
9 cretion is lacking under the remaining provisions of section
0 10(1).

1 One further indicia of the lack of discretion
2 on the part of the Regional Director when he has reasonable
3 cause to believe that a charge alleging a violation of
4 certain sections of the Act is true, is contained in the
5 "Report on Administration of the Labor-Management Relations
6 Act by the NLRB," which is found in the "Summary of Findings

and Conclusions of the Subcomm. on the NLRB of the House Comm. on Education and Labor," 87th Cong., 1st Sess. (1961) (Pucinski Report) [see 48 Lab. Rel. Rep. No. 45 (1961)]. In this Report, the subcommittee found "that the statutory provisions requiring, automatically," that an injunction be sought by the Regional Director, should be modified [id., at 3]:

"The subcommittee, therefore, recommends that the statute be amended so as to give the Labor Board officials opportunity to exercise their discretion in whether or not to petition for the issuance of a court injunction" [ibid.].

See Comment, 111 U. Pa. L. Rev. 460, 465 n.22 (1963).

This Congressional subcommittee was under the impression--an impression justified by the language of the Act--that no discretion existed in the Regional Director, and that he is required under the circumstances present in this case to petition for the issuance of an injunction.

From all of these indicia, therefore, it is plain that once the Regional Director has reasonable cause to believe that a violation of section 8(e) has occurred as charged, he must seek injunctive relief.

B. The District Court Has Discretion to Grant or Withhold Relief.

That the Regional Director has no discretion, but must

seek injunctive relief if he has reasonable cause to believe that a charge alleging section 8(e) conduct is true, is manifest from the statutory scheme. The same lack of discretion, however, does not exist in the District Court, for under section 10(1), upon the filing of a petition by the Regional Director,

"the district court shall have jurisdiction to grant such injunctive relief . . . as it deems just and proper . . ." (emphasis added).

The "it," of course, refers to the District Court, and "the courts have uniformly held that the granting of temporary relief is discretionary, although petitioning for it is not." Comment, 111 U. Pa. L. Rev. 460, 465 (1963).

In a somewhat analogous situation, presented in Frito Co. v. NLRB, 330 F.2d 458 (9th Cir. 1964), this Court commented upon the dichotomy of functions under the Labor Act, of some of the various agencies and tribunals. Charges were filed in Frito against a number of the Clerks' Unions which are involved in the present proceeding, 330 F.2d at 459 n.2, alleging that the contract between the Clerks and the Employers was violative of section 8(e) in that Article I, sections B, C(1), (2) and (3) was designed to cause the Employers to cease doing business with the driver-salesmen of market suppliers, 330 F.2d at 459-60. The Board's General Counsel issued a complaint in which he alleged that the violation of section 8(e) was accomplished

pursuant only to sections C(1) and (3). At the trial before the Board, the charging party offered evidence to the effect that the Act had been violated through the enforcement of some additional sections, sections B and C(2), as well as the Sections enumerated by the General Counsel. Both the Trial Examiner and the Board, however, found no violation of the Act on the basis of the contract sections that were attacked by the General Counsel, and both refused to rule on those contract clauses concerning which evidence was introduced by the charging party but which sections were not alleged to be unlawful in the General Counsel's complaint, 330 F.2d at 461.

This Court held in Frito that the Board had an obligation to examine and rule upon those sections of the contract concerning which evidence was introduced by the charging party without objection, and the Court's reasoning was contained in the following quotation:

"It is now well settled that the General Counsel's decision to investigate a charge or issue a complaint is unreviewable by the Board. However, once the decision has been made to issue a complaint and to prosecute it, the General Counsel has embarked upon the judicial process which is reserved to the Board." 330 F.2d at 463-64.

Just as the General Counsel, once he made a decision to issue a complaint has "embarked upon the judicial

process" and may not thereafter direct the Board in its conduct of the litigation, so too when the Regional Director has filed a petition for injunctive relief--he too has then "embarked upon the judicial process," and the relief, if any, that shall be granted is in the control of the courts. The Regional Director's function is discharged when he makes a finding that there is reasonable cause to petition for injunctive relief.

C. A District Court's Refusal to Accept a Stipulation Rather Than Rule on the Regional Director's Petition, is Within the Court's Discretion.

Once issue has been joined in the federal courts, the parties are no longer at liberty to dispose of their case without leave of court, cf. Fed. R. Civ. P. 41(a)(2); Rollison v. Washington Nat. Ins. Co., 176 F.2d 364, 367 (4th Cir. 1949), and such leave may, in the discretion of the court, be denied or granted, see Diamond v. United States, 267 F.2d 23, 25 (5th Cir. 1959).

A case filed by the Board stands in no different posture in this regard, especially where Congress has directed that the Regional Director file the suit and that the District Court act on it. Indeed, it may well be nonfeasance on the part of the Regional Director should he fail, as required by section 10(1), to "petition . . . for appropriate injunctive relief pending the final adjudication

of the Board" (emphasis added).

While we can agree with the statement in the Board's brief that it is for the Regional Director and not the Court "to determine initially whether there is reasonable cause to believe the Act is being violated," at 17, it does not follow that once such a determination has been made by the Regional Director he may, in the case of a violation enjoined under section 10(1) rather than 10(j), refuse to seek injunctive relief. Cf. Frito Co. v. NLRB, 330 F.2d 458 (9th Cir. 1964). The Board's argument that the District Court is required to accept a stipulation may have some merit were this a proceeding pursuant to section 10(j), for subsumed within the Regional Director's "power" under 10(j) to seek relief, is the power to change his mind and eschew this course of action.

If, however, under the non-discretionary terms of section 10(1), relief was requested by the Regional Director in order merely to comply with the requirements of the Act, only to have the request immediately withdrawn, this would be a clear circumvention of the Congressional dictate. In short, the Regional Director is not at liberty to determine for himself when he shall comply with the mandatory provisions of section 10(1) and when he shall not.

The Court's refusal to accept a stipulation is justified by the terms of section 10(1). The Regional Director's proffer of such a stipulation, on the other hand,

appears to be in derogation of that section.

It is argued that appended to the stipulation was a form of restraining order which could be entered without notice should the Regional Director become convinced that the Clerks and the Employers intended to continue violating the Act [Brief for Appellant Retail Clerks Locals 770, et al., at 22-23]. This argument lacks merit even apart from the question of whether the act of arbitrating was itself a violation of section 8(e).

Section 10(1) states that whenever it is charged that any person has engaged in an unfair labor practice within the meaning of section 8(e) and certain other sections, "the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character." And if the charge is believed to be true, injunctive relief must then be immediately sought. Congress has, in other words, decreed that there shall be neither delay nor discretion on the part of the Regional Director. It has made a legislative determination that injunctive relief shall immediately be sought, see Schauffler v. Local 1291, Int'l Longshoremens Ass'n, 292 F.2d 182, 187 (3d Cir. 1961) ("The Section 10(1) procedure reflects the congressional determination that certain unfair labor practices are so disruptive that where there is reasonable cause to believe that they are being engaged in their continuance during the pendency of charges

before the Board should not be permitted."), and the question of whether such relief should "properly" issue is to be left to the District Courts.

There is simply no room within the statutory mandate, therefore, to argue that the Regional Director may have reasonable cause to believe a charged violation of section 8(e) is true, and at the same time may refuse to seek an injunction. If this is what the parties are arguing, it is plainly contrary to the statutory scheme.

D. A Charging Party May Properly Call Matters to a District Court's Attention Under Section 10(1), and the District Court May Properly Rule Upon Those Matters.

By stating that the Charging Parties caused the Court to violate the Norris-LaGuardia Act, the appellants seek to make an issue out of what in fact is a red herring.

We agree with the position that neither a charging party nor any other person (other than the Board), may sue for an injunction to prevent conduct which is arguably an unfair labor practice, see San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); nor does a charging party or any other person have a right to intervene in a suit filed by the Board under section 10(1). The latter proposition follows from the fact that Congress has specifically delimited, in the second proviso to section 10(1), the status of a charging party as follows:

"Upon the filing of any such petition [for injunctive relief under section 10(1)] the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevent testimony" (emphasis added).

We also agree with the proposition that a charging party has no standing to seek a contempt citation against one who violates a section 10(1) injunction.

But having conceded all this, in light of the statutory status given the charging party it does not follow that the charging party must remain silent, or that any testimony introduced or arguments made may not be listened to or acted upon. The case of Phillips v. UMW. Dist. 19, 218 F. Supp. 103 (E.D. Tenn. 1963), upon which each of the appellants rely in their briefs, involved a motion by a charging party to intervene and to have the respondent held in contempt. In denying these motions, the court said:

"The denial of the right to intervene does not however mean that the charging party is wholly without right to be heard or that the Court will ipso facto disregard any and all legal contentions advanced by the charging party in this proceeding."
218 F. Supp. at 106.

The court then proceed to take up each of

the charging party's legal contentions and dispose of them on the merits, thereby substantiating its statement that it would not refuse to consider matters merely because they had been advanced by the charging party rather than by the Board.

And the case of McLeod v. Business Mach.

Mechanics, 300 F.2d 237 (2d Cir. 1962) does not detract from the proposition that within the limits of the petition filed by the Regional Director (or within the limits of the evidence presented to the District Court without objection, cf. Frito Co. v. NLRB, 330 F.2d 458, 464-65 [9th Cir. 1964]), the charging party may present views to the District Court which may be accepted by the court even though these views were not urged by the Regional Director. In McLeod v. Business Mach. Mechanics, supra, the charging party sought on appeal to broaden the issues beyond the points upon which the Regional Director relied in his petition and argument, 300 F.2d at 242, and the court held that it was without jurisdiction to consider the expanded issues, 300 F.2d at 242-43.

To the extent that a District Court enjoins acts other than those which were petitioned against or which were shown by unobjected-to evidence to be of a similar nature, the Business Mach. Mechanics case may have relevance; however, as shall be shown, the order in the present proceeding did not go beyond these limits and it was, therefore, within the District Court's power.

UNDER THE FACTS OF THIS CASE, THERE
WAS "REASONABLE CAUSE" TO BELIEVE THAT THE
CLERKS' CONDUCT VIOLATED SECTION 8(e),
AND THE DISTRICT COURT'S ORDER WAS
"JUST AND PROPER."

In order to sustain an injunctive order under section 10(1), it is necessary that the Regional Director have "reasonable cause" to believe a charged violation of section 8(e) is true; and the order issued by the District Court must be "just and proper."^{5/}

A. The Regional Director Had "Reasonable Cause" to Believe the Charged Violation of Section 8(e) Was True.

The petition filed by the Regional Director was verified. In the petition it was alleged that a prior proceeding under section 10(1) had been instituted against

^{5/} The suggestion in the brief of Clerks Locals 324, et al., at 14, that this matter may be moot because there was present a different request for arbitration than the one which initiated the Regional Director's petition, is answered by Division 1287, Amalgamated Street Employees v. Missouri, 374 U.S. 74, 77-78, 10 L.Ed.2d 763, 765-66 (1963), and by the fact that both arbitration demands were essentially the same.

the Clerks [T.R. 15, ¶6], and had been dismissed upon the Clerks' stipulation to refrain from "maintaining, giving effect to or enforcing Article I" of their collective bargaining agreement with the Employers, so far as it required the Employers to cease doing business with other persons [T.R. 45, ¶2(a)].

In violation of their stipulation, the Clerks demanded arbitration of the portion of Article I that was in dispute [T.R. 16, ¶8]. The arbitration demand was addressed to the question of whether as a result of the Clerks' inability to enforce Article I, there had been a failure of consideration sufficient to require a renegotiation of the collective bargaining agreement, and whether the Clerks were free to strike the Employers because of the parties' inability to put Article I into effect (the latter point being underlined by the Clerks in their letter to the Employers in order that the significance of the strike threat not escape the Employers' attention) [T.R. 56-57].

Having alleged these facts, the Regional Director next alleged that "by the acts and conduct" of demanding arbitration of those issues, "respondent Local 770 [of the Clerks] has entered into, invoked and given effect to a contract or agreement" which violates section 8(e) [T.R. 16-17, ¶9].

Prior to the hearing in the District Court on the proposed stipulation to refrain from engaging in unfair

1 labor practices in the present case, the Charging Parties
2 filed a written memorandum. They pointed out in this
3 memorandum that the Regional Director had presented no
4 affidavits or other evidence in support of his request to
5 permit arbitration to proceed, "to show how conduct which
6 is alleged in [the] Petition to be a violation of the Act
7 . . . is now not regarded as wrongful" [T.R. 134]. At the
8 hearing on May 10, 1965, it was again pointed out that the
9 petition alleged that proceeding to arbitration was a
0 violation of the Act [May 10 Trans. at 17, lines 15-18],
1 and that the Regional Director had presented no evidence
2 to the contrary [id., at 33, lines 7-18]. And in the
3 District Court's memorandum opinion, filed on May 27, the
4 Court told the Regional Director:

5 "That effort at arbitration is alleged in the
6 Petition to be a violation of the Act, and is
7 specifically asked to be enjoined by Paragraph 1(a)
8 of the prayer of the complaint in this court"
9 [T.R. 168, lines 20-23].

0 In the face of these many statements by the
1 Court and the Charging Parties that it was the Regional
2 Director's own sworn petition which was being relied upon
3 for the proposition that permitting arbitration to proceed
4 would violate the Act, and notwithstanding that following
5 these events a motion for reconsideration was filed by the
6 Regional Director [T.R. 172], no effort was made to amend

1 the petition; no effort was made to introduce any evidence
2 or show any facts to controvert the sworn statements in the
3 petition; and more, the Regional Director at no time repre-
4 sented to the Court that such conduct would not violate the
5 Act, but only that he had been given assurances that any
6 arbitration award would not be put into effect until it had
7 first been approved by him.

8 This constituted on the part of the Regional
9 Director an admission that arbitration of the attacked
0 clauses would violate the Act. The Regional Director chose
1 to rest his case on the legal principal that the District
2 Court was required, as a matter of law, to accept the
3 proffered stipulation,^{6/} and when this position was ruled
4 upon adversely to the Regional Director he informed the Court
5 that "the petition and the documents attached to the plead-
6 ings give reasonable cause for the Regional Director to
7 believe that there has been a violation of the Act" [June 14
8 Trans. at 50, lines 7-11].

9
0 ^{6/} When the Court denied the Regional Director's motion for
1 reconsideration, a motion was made by the Regional Director
2 to certify the matter to the Court of Appeals on the legal
3 issue of the refusal to approve the stipulation [May 14 Trans.
4 at 6, line 18 to p. 7, line 8], at which time the Court again
5 pointed out that the petition itself alleged that the Clerks'
6 conduct violated the Act [id., at 7, lines 9-17].

1 Apart from his legal position, therefore, that
2 the stipulation should be approved and that it was error not
3 to do so, the Regional Director acknowledged that he had
4 reasonable cause to believe that the charge alleging a
5 violation of section 8(e) was true, that proceeding to
6 arbitration would violate the Act, and that the arbitration
7 should be enjoined.

8 The Clerks similarly chose to rest their case
9 without putting on any evidence. Their position must now
0 be that as a matter of law the Regional Director did not
1 have reasonable cause to believe that demanding and engaging
2 in arbitration with respect to clauses that are violative
3 of section 8(e), is itself a violation of section 8(e). This
4 position is amply refuted in the points and authorities
5 filed by the Regional Director in support of his application
6 for an injunction [see T.R. 87-104]. Some of the cases cited
7 by the Regional Director are the following: Hillbro News-
8 paper Printing Co., 135 N.L.R.B. 1132, enforced, Los Angeles
9 Mailers Union V. NLRB, 311 F.2d 121 (D.C. Cir. 1962) (re-
0 affirming hot cargo clause is "entering into" it); Kennedy
1 v. Service Employees Union, Civil No. 63-490-JWC (S.D. Cal.
2 1963) (arbitrating is equivalent to giving effect to unlaw-
3 ful clause); McLeod v. American Fed'n of Television Artists,
4 234 F. Supp. 832 (S.D.N.Y. 1964) (ibid.). We urge this
5 Court to read the Regional Director's excellent points and
6 authorities on this issue for a dispositive argument,

complete with quotations from the Act's legislative history, that demanding arbitration of the attacked clauses (especially, as here, under strike threats), is a violation of section 8(e) of the Act.

B. The District Court's Order Was "Just and Proper."

Under section 10(1), the District Court is given jurisdiction to issue such order as is "just and proper." The order in this case was such an order.

The District Court was aware when it issued its order that the Clerks had once before promised to refrain from engaging in unfair labor practices, but that they had violated this pledge. Although the Regional Director was willing to take the Clerks' word a second time, the fact of the Clerks' duplicity was before the Court and obviously convinced it that if given the opportunity, the Clerks would again violate a stipulation. Having arrived at such a conclusion, the Court was free to exercise the powers supplied to it by section 10(1) and issue an injunction

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1 rather than approve a stipulation.^{7/}

2 The Clerks' demand for arbitration of the
3 attacked clauses caused the Regional Director in his petition
4 to claim a violation of the previous settlement agreement.
5 The arbitration that was demanded was over grievances claimed
6 to have arisen as a result of the unenforceability of the
7 attacked clauses.

8 In other words, for not giving effect to the
9 attacked clauses, and not refusing to deal with persons who
0 were non-signatories to a Clerks' agreement, the price to be
1 paid by the Employers was that they were to be subjected to
2 an arbitration proceeding designed to void the entire con-
3 tract and to release the Clerks' from their no-strike pledge.

4 This Court, in NLRB v. Amalgamated Litho-
5 graphers, 309 F.2d 31 (9th Cir. 1963), held similar tactics
6 to be violative of the Act. The lithographers in that case
7 had a "trade shop" clause which was found to violate section
8 8(e), and although the employers were not required to live
9 up to this clause, if they did not do so the lithographers
0

1 7/ There are some matters, such as judging the veracity of
2 witnesses, which do not require the Board's "expertise" and
3 which courts are at least as capable of ruling on. Cf. NLRB
4 v. Int'l Union of Operating Eng'rs, Local 12, 323 F.2d 545,
5 548 (9th Cir. 1963) (legal effect of contract is a matter of
6 law, and court not bound by Board's construction).

were free to open the contract. Concluding that under this provision "the employer agrees that he will deal with non-union employers only at the risk of giving up all of his benefits under his contract," 309 F.2d at 36, the Court found this tactic to be unlawful. The Board too has dealt with such subterfuges and has uniformly condemned them. See, e.g., Arthur J. Galligan, 148 N.L.R.B. No. 31, 56 L.R.R.M. 1471, 1472, 1964 CCH NLRB ¶13,334 at pp. 21,295-96 (1964) (imposition of financial penalty on employer who purchases coal from non-union company). And in Brown Transport Corp., 140 N.L.R.B. 1436 (1963), set aside on other grounds 334 F.2d 539, 548-49 (D.C. Cir. 1964), the Board said of a "hazardous work clause" which permitted the contract to be reopened for additional benefits if the employees were required to handle "hot cargo,"

"It is a method for making it difficult and expensive, and unlikely for an employer signatory to the agreement to insist that his employees handle 'hot cargo' goods or equipment." 140 N.L.R.B. at 1439.

Both the Board and the Courts have seen through such devices. By demanding of the Employers an arbitration in which the Employers can gain nothing, but risk losing their entire contract and being subjected to a strike, the Clerks have advised the Employers that the only real alternative is to "voluntarily" give effect to the

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unlawful clauses.^{8/} It is this conduct of which the District Court was aware and which it enjoined when it ordered the Clerks to refrain from arbitrating any matters in connection with the contested clauses.

That the seven points which the Clerks seek to arbitrate are but a ruse is evidenced by the uncontradicted evidence supplied by the head of one of the Clerks' unions. DeSilva, in his newspaper article, stated that any time the Employers wished to avoid the trouble and expense of arbitration, they could do so simply by "voluntarily" living up to the illegal clauses, see pp. 6-7, supra. These points were, in other words, "a strategem to enforce or maintain contractual provisions in a manner which makes the provisions unlawful under the Act" [Brief for Board at 18]. See McLeod v. American Fed'n of Television Artists, 234 F. Supp. 832 (S.D.N.Y. 1964), in which an arbitration proceeding was enjoined at the insistance of the

^{8/} There is, of course, no unlawful conduct under the Act when, absent an agreement either "express or implied," §8(e), one employer ceases dealing with another employer at the urging of a union, see Local 20, Teamsters v. Morton, 377 U.S. 252, 259, 12 L.Ed.2d 280, 286 (1964). It is only when there is an agreement between the union and employer to that effect, or when the "urging" becomes a form of pressure, that the conduct is unlawful.

This evidence was before the District Court, as was the evidence that the Employers agreed to arbitrate only under a strike threat. The bona fides of the Clerks' arbitration demands were clearly in issue and the Court ruled, on the basis of the evidence before it, that the arbitration was but a sham which in truth was intended to compel compliance with the unlawful clauses. For this reason, the Court enjoined any arbitral proceedings arising out of these clauses.

Parenthetically, the original injunction order-- drawn up by the Board and approved as to form by the Clerks-- enjoined in paragraph (c) the carrying on of any arbitration under all of Article I of the Clerks' agreement [T.R. 204]. Objections to the breadth of the proposed order were filed by the Charging Parties [T.R. 195], and in the Court's nunc pro tunc order paragraph (c) was limited so that

9/ Inasmuch as the arbitration itself constitutes an unfair labor practice and a violation of the Act, see McLeod v. American Fed'n of Television Artists, 234 F. Supp. 832 (S.D.N.Y. 1963), the Clerks' (Local 770, et al.) citation of Supreme Court cases which favor arbitration of issues that may be unfair labor practices, is inapposite to the question of whether the arbitration in this case should be permitted to proceed.

arbitrations could take place with respect to sections of Article I other than those in dispute [T.R. 199]. The Board's brief incorrectly chronologizes these events, and it appears that the writers thought there was first a limited order issued but that "at the request of the charging parties and over the Board's objection, the court amended the order nunc pro tunc to add paragraph (c) thereof which was not so limited" [Brief for Board at 18-19]. Presumably, now that the Board is apprised of which order is in effect, its objection to the present order's breadth will be withdrawn since its brief appears to say it was satisfied with the "original" order [id., at 18]. Moreover, the present injunction is quite like the one prayed for in the petition [T.R. 17-18, ¶1(a)].

CONCLUSION

The Charging Parties have, by statute, been given sufficient status in a section 10(1) proceeding to permit them to present facts and law to the District Court. The Charging Parties did not initiate any proceedings but were merely present to protect the interest that Congress gave to them. In protecting this interest, they were able to bring to the Court's attention certain matters which supported the position originally taken by the Regional Director, which did not go beyond the issues framed by the Regional Director's petition, and which were of sufficient

moment to convince the Court that the Regional Director's prayer should be satisfied.

For this, the Charging Parties are described as having caused the Court to violate the Norris-LaGuardia Act. The same, however, could be said any time a charging party presents evidence upon which the District Court decides to act. Presumably, in giving charging parties status, Congress had in mind some reason other than merely to permit charging parties to parrot the Regional Director, else this would have been a useless act. The present case demonstrates the utility of permitting charging parties a voice.

In fulfilling the function prescribed for them by Congress, the Charging Parties were able to present to the District Court evidence demonstrating that the Clerks had previously been unfaithful to their promise, and that the proposed arbitration was merely one more in a series of tactical moves to secure "voluntary" compliance by the Employers with illegal contract clauses. Therefore, in addition to the arbitration being unlawful per se as an affirmation of illegal clauses, the Court was convinced that the Clerks had an unlawful and ulterior motive in attempting to compel the Employers to arbitrate.

For either or both of these reasons, the Court was correct in enjoining the arbitration, and the

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order should be affirmed.

Respectfully submitted,

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APPENDIX

This appendix lists all the Acts of Congress which we have been able to find, in which administrative agencies are authorized to seek injunctive relief in the district courts.

1. Agricultural Adjustment Administration Act, 7 U.S.C. §608a(7) (whenever the Secretary [of Agriculture] . . . has reason to believe that any handler has violated . . . any order . . . the Secretary shall have power to institute an investigation . . . for the purpose of referring the matter to the Attorney General for appropriate action") (emphasis added).
2. Atomic Energy Act, 42 U.S.C. §2280 ("[T]he Attorney General . . . may make application to the appropriate court . . .") (emphasis added).
3. Electric Utility Companies Act, 16 U.S.C. §825m(a) ("[The Federal Power Commission] may in its discretion bring an action in the proper District Court . . .") (emphasis added).
4. Emergency Price Control Act, as quoted in Hecht v. Bowles, 321 U.S. 321, 321-22, 88 L.Ed. 754, 756 (1954) ("[The Administrator of the Office of Price Administration] may make application to the appropriate court . . .") (emphasis added).

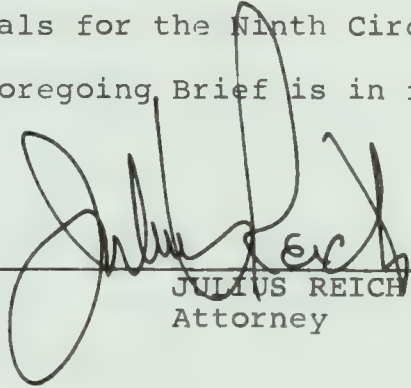
5. Fair Labor Standards Act, 29 U.S.C. §216(c) ("[T]he Secretary of Labor may bring an action in any court . . .") (emphasis added).
6. Federal Aviation Program Act, 49 U.S.C. §1487(a) ("[T]he [Civil Aeronautics] Board or Administrator [of the Federal Aviation Agency] . . . may apply to the district court . . .") (emphasis added).
7. Federal Trade Commission Act, 15 U.S.C. §53(a) ("[T]he [Federal Trade] Commission . . . may bring suit in a district court . . .") (emphasis added).
8. Holding Company Regulation Act, 15 U.S.C. §79r(f) ("[The Securities and Exchange Commission] may in its discretion bring an action in the proper district court . . .") (emphasis added).
9. Interstate Commerce Act, 49 U.S.C. §16, par. (12) ("[T]he Interstate Commerce Commission or any party injured . . . or the United States . . . may apply to any district court . . .") (emphasis added).
10. Interstate Commerce Act, 49 U.S.C. §43 ("[A] petition may be presented [by the Interstate Commerce Commission] . . . to the district court . . .") (emphasis added).
11. Interstate Commerce Act, 49 U.S.C. §322(b) ("[T]he [Interstate Commerce] Commission . . . may apply to the district court . . .") (emphasis added).

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12. Interstate Securities Act, 15 U.S.C. §78u(e) ("[The Securities and Exchange Commission] may in its discretion bring an action in the proper district court . . .") (emphasis added).
13. Investment Advisers Act, 15 U.S.C. §806-9(e) ("[The Securities and Exchange Commission] may in its discretion bring an action in the proper district court . . .") (emphasis added).
14. Investment Companies Act, 15 U.S.C. §80a-41(e) ("[The Securities and Exchange Commission] may in its discretion bring an action in the proper district court . . .") (emphasis added).
15. Labor-Management Relations Act, 29 U.S.C. §160(j) ("The [National Labor Relations] Board shall have the power . . . to petition any United States district court . . .") (emphasis added).
16. Labor-Management Relations Act, 29 U.S.C. §178(a) ("[The President [of the United States] may direct the Attorney General to petition any district court . . .") (emphasis added).
17. Securities Act of 1933, 15 U.S.C. §77t(b) ("[The Securities and Exchange Commission] may in its discretion, bring an action in any district court . . .") (emphasis added).

CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Code of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those Rules.



A handwritten signature in dark ink, appearing to read 'Julius Reich', is written over a horizontal line. The signature is stylized with large loops and a prominent 'R'.

JULIUS REICH
Attorney

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA]
] ss.
County of Los Angeles]

I, PATRICIA WIMBERLY, being first duly sworn,
depone and say as follows:

I am a citizen of the United States and am
employed in the County of Los Angeles, State of California;
I am over the age of eighteen years and am not a party to
this action; my business address is 1621 West Ninth Street,
Los Angeles 90015, in said County and State; on the 19th day
of August, 1965, I served the within BRIEF FOR AMICUS CURIAE
JOINT COUNCIL OF TEAMSTERS NO. 42, on the Appellants,
Appellee and Charging Parties in this action, by placing a
true copy thereof in an envelope addressed to their attorneys
of record, addressed as follows:

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and by then sealing said envelope and depositing the same,
with postage thereon fully prepaid, in the mail box regularly
maintained by the Government of the United States at Ninth
and Beacon Streets, in the City of Los Angeles, State of
California.

I certify under penalty of perjury that the foregoing
is true and correct.

Patricia Wimberly
PATRICIA WIMBERLY

SUBSCRIBED and SWORN to
before me this 19th day
of August, 1965.

Notary Public in and for said County and State

D. C. HARMS
My Comm. Expires July 2, 1969

NOTARY SEAL
D. C. HARMS
NOTARY PUBLIC - CALIFORNIA
NOTARY OFFICE IN
LOS ANGELES COUNTY

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RETAIL CLERKS UNION, LOCALS.
770, 137, 905 and 1222,

Appellants

and

RALPH E. KENNEDY, Regional
Director of the Twenty-First Region
of the National Labor Relations
Board, etc.,

Appellant

vs.

FOOD EMPLOYERS COUNCIL, INC.,

Appellee

On Appeal From The United States District
Court For The Southern District Of California,
Central Division

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

JUL 22 1965

FRANK H. SCHMID, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 20201

RETAIL CLERKS UNION, LOCALS
770, 137, 905 and 1222,

Appellants

and

RALPH E. KENNEDY, Regional
Director of the Twenty-First Region
of the National Labor Relations
Board, etc.,

Appellant

vs.

FOOD EMPLOYERS COUNCIL, INC.,

Appellee

On Appeal From The United States District
Court For The Southern District Of California,
Central Division

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE CASE

A. Introductory

These are appeals from an injunction entered by the United States District Court for the Southern District of California, Central Division, in a proceeding instituted by petitioner-appellant, Ralph E. Kennedy, Regional Director of the Twenty-First Region of the National Labor Relations Board (herein called the Board), for and on behalf of the Board, pursuant to

tion 10(1) of the National Labor Relations Act, as amended (61 Stat. 149; Stat. 544; 29 U.S.C. 160(1); herein called "the Act").^{1/} The injunction, nominated Order Granting Temporary Injunction, was granted on June 24, 1965, entered on June 25, 1965, and amended by an order nunc pro tunc on June 25, 1965. In sum, the injunction enjoined various unions, respondents in the court below, like the Board, appellants here and various named employers and an employer association, designated as appellees here, from maintaining contract provisions in violation of Section 8(e) of the Act and from requiring, or submitting to, arbitration certain questions bearing upon those contract provisions. The injunction, granted at the request of the parties who had filed the unfair labor practice charges, was entered over the objections of the Board and the unions (1) that no injunction was warranted at this time because the unions had

Section 10(1) of the Act provides, in pertinent part, as follows:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A)(B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law . . . Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony

stipulated that pending scheduled arbitration proceedings, and thereafter pending Board disposition of the unfair labor practice charges they would not maintain or give effect to the alleged unlawful provisions, and (2) the injunction was too broad in scope. Notices of Appeal therefrom were filed on June 25, 1965 by the Board (R. 221) and the Unions (R. 222-225). Jurisdiction of this Court is invoked under Sections 1291 and 1292 of Title 28 of the United States Code.

B. The Proceedings Below

On May 7, 1964, American Research Merchandising Institute, United States Servateria Corp., and Wesco Merchandise Company (herein called "the Institute", "Servateria" and "Wesco", respectively), filed with the Board's Twenty-First Region a joint charge (R. 20-32), ^{2/} alleging that appellants Retail Clerks Unions, Locals Nos. 137, 324, 770, 899, 905, 1167, 1222, 1428 and 1442 (herein called the "Unions"), had engaged in, and were engaging in, unfair labor practices proscribed by Section 8(e) of the Act. ^{3/} On the same day, the Joint Council of Teamsters No. 42 (herein called the "Teamsters") also filed with the Board's Twenty-First Region a charge (R. 33-39) alleging, inter alia, that Food Employers Council, Inc. (herein called the "Employers

The numbers following the abbreviation "R" refer to pages of the transcript of record on appeal. The numbers following the abbreviation "Tr" refer to pages of the reporter's transcript of proceedings held in the court below on June 14, 1965.

Section 8(e) of the Act provides in pertinent part, as follows:

Sec. 8.(e). It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . .

ouncil") and its named members (herein with the Employers Council collectively referred to as the "Employers"), as well as the Unions, had engaged in, and were engaging in, similar unfair labor practices proscribed by Section 8(e) of the Act.

Thereafter, on January 8, 1965, the Regional Director, acting on behalf of the Board, filed in the court below the petition for an injunction, pursuant to Section 10(1) of the Act, seeking to restrain the Unions and the employers from continuing to engage in the conduct complained of pending final adjudication of the charges by the Board (R. 2-58). The petition alleged, in substance, that the Director had reasonable cause to believe that on or about April 1, 1964, the Unions and Employers had entered into a collective bargaining agreement, effective from that date until March 31, 1969, containing certain provisions in Article I thereof which were violative of Section 8(e) of the Act (R. 5-11, 13, 15-16), and that these provisions had been continued in effect and were being maintained (R. 15-16). The petition showed that the Board had filed an earlier petition under Section 10(1) to restrain the Unions and Employers from maintaining, giving effect to, or enforcing Article I of the contract "to the extent found unlawful" but, upon a court approved stipulation by the Unions and Employers not to engage in such conduct pending Board disposition of the unfair labor practice charges, that proceeding had first been continued without date on the district court's docket and then, on December 3, 1964, dismissed without prejudice (R. 15-16). The petition then alleged that in November, 1964, one of the Unions had filed a grievance under the contract which contained Article I demanding implementation and arbitration of portions of that Article alleged in the Board's petition to be

violative of Section 8(e), and had instituted proceedings in the California Superior Court to compel arbitration (R. 15).^{4/} The petition further alleged that Local 770 was continuing actively to prosecute the state court action, that thereby and by the conduct previously alleged Local 770 was continuing to give effect to the unlawful provisions of Article I (R. 15-16), and that it could be anticipated that unless enjoined the Unions and Employers would continue to give effect to those provisions or enter into similar agreements (R. 16). The petition prayed that the Unions and Employers be enjoined, pending Board determination on the merits of the charges, from, inter alia, "maintaining, giving effect to, demanding arbitration of, submitting to arbitration, or enforcing the challenged contract provisions insofar as they were violative of Section 8(e) of the Act, or agreeing to similar provisions (R. 17-18).

Upon the petition, the court below, on January 11, 1965, entered an order directing, inter alia, that the Unions and Employer file answers to the petition and appear thereafter to show cause why the requested injunctive relief should not be granted (R. 59-61).

Thereafter, the various parties respondent in the court below filed answers to the petition. In the answer filed by Local 770 and several of the other Unions, it was alleged inter alia, that on April 6, 1965, they had caused the State court proceeding to compel arbitration to be dismissed; that they seek only an interpretation, whether by arbitration, court proceeding or voluntary negotiations, of the meaning of the contract and what are respondents remaining rights resulting from the unenforceability of the provisions alleged to be unlawful by the Board"; and that "Whatever such interpretation or

/ As can be seen, the grievance was filed and the state court proceedings were instituted after the stipulation not to maintain or enforce the illegal provisions had been executed in the Board's prior district court proceedings but before dismissal of those proceedings.

decision might be, respondents have no intention to . . . use said interpretation or decision to give any unlawful effect to the contract . . ." (R. 120). The answer prayed that "if the Court does grant injunctive relief, it should be limited to giving effect to the unlawful provisions . . . and should not prohibit the respondents from seeking, whether by arbitration or otherwise, an interpretation of the contract which will not give effect to any of the provisions alleged to be unlawful by the National Labor Relations Board"(R. 121).

As the record indicates, prior to the hearing on the petition,^{5/} it developed that there were differences between the Unions and the Employers as to what their collective bargaining agreement provided, their understanding as to what they had agreed to or intended to agree to in the course of their bargaining and that both parties had submitted these and other questions to an arbitrator (R. 187, Tr. 30, 34, 41-42, 43-46).^{6/}

8/ The hearing, originally scheduled by the order to show cause for February 15, 1965, was thereafter continued and not held until May 10, 1965.

9/ The Unions and Employers had agreed to arbitrate the following seven points (R. 188-189):

(1) Paragraph seventeen of said Memorandum Agreement, executed by Mr. Robert K. Fox on behalf of the Food Employers' Council, Inc., and the signatory Unions, wherein it is stated that the agreement would become effective upon ratification by all parties. Conceding that ratification took place prior to April 1, 1964, the effective date of the agreement, it is evident by the Union's position as set forth in Appendix C of the Union's printed copy of the agreement, that there is an issue as to whether or not a meeting of the minds was achieved on March 14, 1964, or whether or not the efforts of the parties over fifteen months of negotiations have been nullified.

(2) The issue of whether or not there has been a failure of consideration, nullifying the March 14, 1964 Memorandum Agreement.

(3) As a result of charges filed with the National Labor Relations Board by the Teamsters Union and certain suppliers, Article I has never become operative and cannot become operative during the term, or a substantial part of the term of our contract, because of the length of time it will require to litigate the Board complaint and subsequent appeals. There is an issue, therefore, as to whether or not the employer is being unjustly enriched
(continued)



As a result, and in order to permit the parties to the contract to resolve the issues between them pursuant to their mutual undertaking to arbitrate, but at the same time to reserve to the Board its function of determining the legality under Section 8(e) of any agreement between them, and also at the same time to prevent them from giving effect to any provision unlawful under Section 8(e), the Board, the Unions and the Employers entered into a stipulation to continue the district court proceedings without date, subject to specific undertakings by the Unions and safeguards to prevent a continuing violation of Section 8(e) or the sanctioning of any interpretation by the arbitrator which in the opinion of Board representatives would render any contractual provisions violative of the Act. Specifically, for purposes of the proceedings in the court below, and only for such purposes, on May 10, 1965, the Board, the Unions

/ (continued)

because of the inoperativeness of Article I, in that the employer has been able to take advantage of the (a) broader box-boy duties, (b) new classifications with lower rates for non-food items, and (c) lower apprentice rates, which were given to the employer only upon the understanding of both parties that Article I would be effective and would confer benefits upon the Union.

(4) The issue of which agreement (that printed by Robert K. Fox, or that printed by the Union) shall be applicable.

(5) Has the employer, in good faith, complied with the provision in the March 14, 1964 agreement that it will jointly defend with the Union the legality of Article I?

(6) The issue of whether or not in effect the present Board action and its subsequent inevitable appeals and court actions require an interpretation that "a court of last resort" status has been achieved.

(7) Should the arbitrator find that the status of the "court of last resort" has been attained, and should the parties fail to resolve their differences which have arisen because of the interpretation and application of the March 14, 1964 agreement, then does the Union have the right to take economic action?

and the Employers executed a stipulation to be submitted to the court below, providing in pertinent part as follows (R. 160-167; Tr. 10-12, 24, 46-47):

* * *

1. Pending the final disposition of the matters involved presently pending before the /Board/ . . . respondents, and each of them, WILL REFRAIN FROM:

(a) Maintaining, giving effect to, or enforcing Article I, Sections A. B and F(1) and (2), of that certain Retail Food, Bakery, Candy, and General Merchandise Agreement entered into on or about April 1, 1964, by and between respondent Unions and respondents Food Employers Council and Council Members, and certain other markets, insofar as said Article I requires employees of any distributor, supplier, rack jobber, concessionaire, or any other person doing business with respondent Council Members, or with any other retail food market within the geographical jurisdiction of respondent Unions, or of any of them, to become members of any of respondent Unions' bargaining unit as a condition of being able to perform work in the store or stores or on the premises of any of respondent Council Members, or such other retail food markets; or requires any distributor, supplier, rack jobber or concessionaire to become a party to a concessionaire agreement with any respondent Council Member, or with any other retail food market in whose store or stores employees of such distributor, supplier, rack jobber concessionaire, or such other person, may work; or prohibits the employees of any distributor, supplier, rack jobber, concessionaire, or of any other person, from working in the store or stores of any of respondent Council Members, or in any other retail food market, unless such distributor, supplier, rack jobber, concessionaire, or such other person, becomes a party to the Concessionaire Agreement referred to in Article I of the Clerks' Agreement and agrees to be bound by the terms and conditions of the said Clerks' Agreement; and

(b) Enforcing or confirming, or instituting any proceedings or taking any action in an attempt to enforce or confirm, any arbitration award based upon any provision of Article I of the Clerks' Agreement until or unless such arbitration award has been submitted to the Regional Director of the Twenty-first Region of the Board and he, or some other person authorized to act in his behalf, after consideration of the arbitration award, has concluded that such an award is not repugnant to and does not violate the provisions of Section 8(e) of the Act and the Regional Director, or such other person acting in his behalf, has, in writing, so advised respondents or their counsel of record.

2. In the event that the Regional Director of the Twenty-first Region of the National Labor Relations Board, or any agent of the Board authorized to act in his place or stead, after investigation of an alleged breach by respondents, or any of them, of any of the

provisions of paragraph 1 of this stipulation, has reasonable cause to believe that any of the said provisions have been violated, then, upon the filing of an affidavit by him to that effect, the Court may, without further notice to respondents, enter a temporary injunction against respondents in the form set forth in Exhibit A attached hereto. In such event respondents waive further hearing before the Court, the taking of formal testimony and the making and entering of findings of fact and conclusions of law.

* * *

At the hearing on the petition, held on May 10, 1965, and June 14, 1965, no oral testimony was adduced; the case was considered by the court below on the pleadings and exhibits thereto attached, several additional exhibits filed with the court (R. 31-32, 48-49), and argument of counsel. When the Board submitted the stipulation to the court and asked that the court approve the stipulation and continue the proceedings without the entry of any injunction at that time, the charging parties objected and requested that the court enter an injunction then and there (R. 128, 144, 156). At the hearing on May 10, 1965, and again on June 14, 1965, upon the Board's motion for reconsideration, the court rejected the stipulation and over the Board's objections granted an injunction.

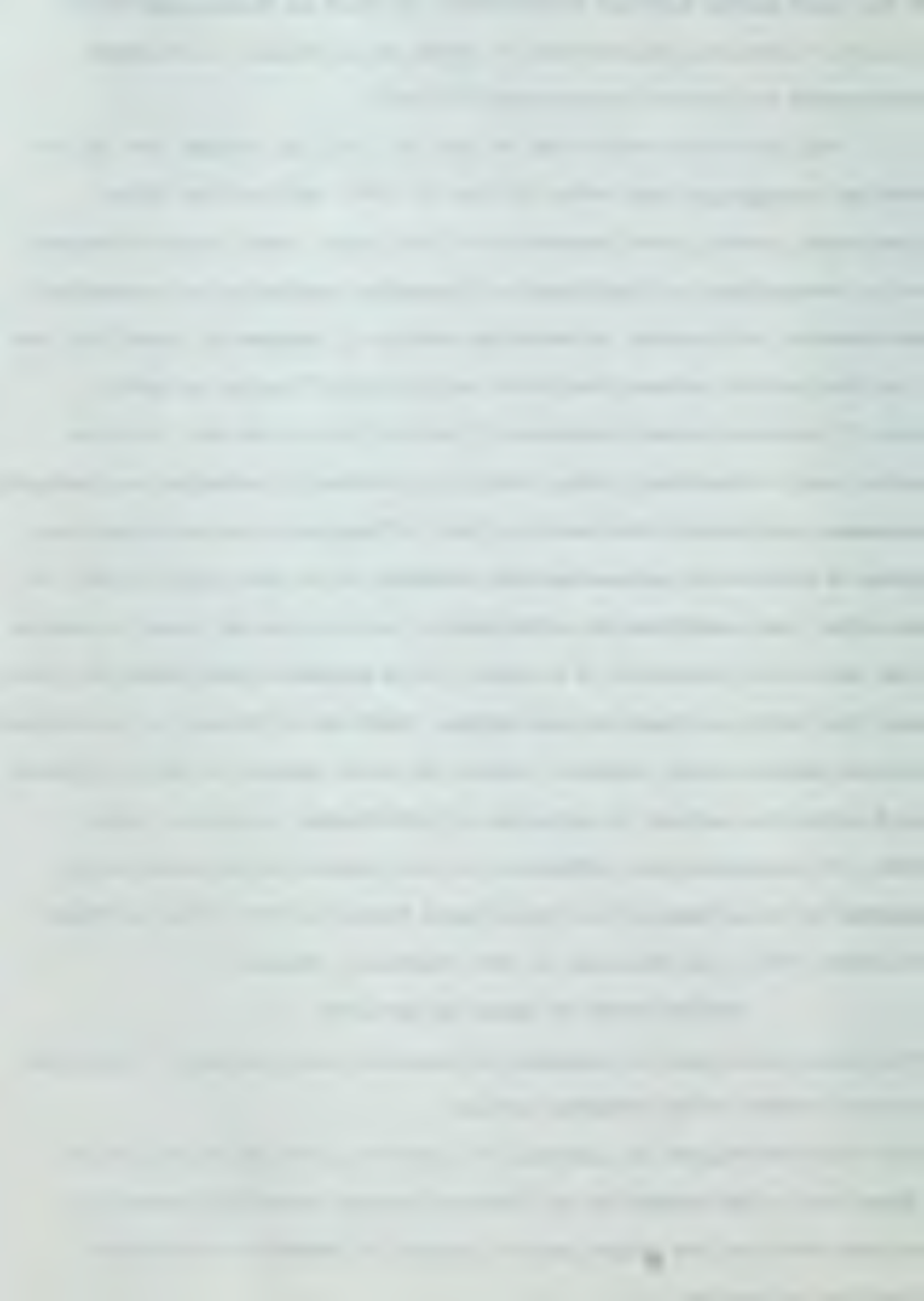
Additionally, at the hearing on June 14, 1965, the court, at the request of the charging parties and over the objection by the Board that any injunction should not "go beyond that conduct which would violate Section 8(e)" and should not "prevent arbitration . . . to the extent that it will not in any way affect the application of the . . . Act", directed that the injunction should enjoin the Unions and Employers from proceeding inter alia with their arbitration (Tr. 50-52, 53-54). The court concluded that notwithstanding the stipulation and position of the Board, the injunction should issue now, as requested by the charging parties, and in the scope as requested by them, because, in sum, the Board's petition filed on January 8, 1965, had sought to enjoin arbitration proceedings (Tr. 6, 7, 50-51). The court was of the

that the Board having asserted jurisdiction, it would be inconsistent with the Board's "exclusive jurisdiction" to permit an arbitrator to determine matters within the Board's jurisdiction (R. 169).

The injunction order filed on June 24, 1965 and entered June 25, as amended by the nunc pro tunc order of June 25, 1965, enjoined the Union and employers, pending Board disposition of the unfair labor practice charges, from (a) "Maintaining, giving effect to, demanding arbitration of, submitting to arbitration, arbitrating, or enforcing Article I, Sections A, B and F(1) and 2)" of the contract between the Unions and Employers "insofar as said Article I" requires conduct violative of Section 8(e) of the Act, (b) from entering into, maintaining, giving effect to, invoking or enforcing any contract or agreement violative of Section 8(e), and (c) "Engaging in or carrying on or carrying on arbitration proceedings now scheduled on or about July 5, 1965, or at any other time submitting to arbitration or arbitrating any issue or dispute arising out of the provisions of Article I of an Agreement dated March 14, 1964, between the Clerks and Employers and others, which are in dispute in proceedings before the National Labor Relations Board, and which pertain to the performance of work within the markets by employees of distributors, suppliers, rack-jobbers, or concessionaires, including, but not limited to the seven points designated to be in dispute in a letter dated March 19, 1965, from the Retail Clerks Union 770 to the President of Food Employers' counsel."

SPECIFICATION OF ERRORS RELIED UPON

- . The court below erred in granting an injunction over the Board's objection and at the request of the charging parties.
- . The court below erred in granting an injunction, over the objections of the Board and at the request of the charging parties, which was broader in scope than the Board had sought and not limited to conduct proscribed by Section 8(e) of the Act.



ARGUMENT

I. An injunction under Section 10(1) may be granted only at the request of the Board and the charging party has no standing to secure such injunction.

A. The charging parties have no standing to request the court to grant an injunction.

At the outset, it is well to point out that the merits of the alleged unfair labor practice, i.e. whether the Unions and Employers engaged in conduct violative of Section 8(e) of the Act, are not at issue here. The Unions and the Employers having stipulated that they would not engage in conduct violative of Section 8(e) of the Act pending Board disposition of the charges and that an injunction could be entered without further hearing before the court below simply upon the determination of the appropriate Board representative that they were engaging in such conduct, thus leaving to the Board in accordance with the Act any determination on the merits, thereby dispensed with the need for any determination by the court as to whether there was reasonable cause to believe the Act had been violated.

Section 10(1) of the Act empowers the Board to obtain interim injunctive relief against conduct violative of certain provisions of the Act pending the Board's final disposition of the case on the merits (infra, p.2). It has long been settled that proceedings under the Act are intended to protect the public interest and not the interests of a private party; that the Act gives the Board, a public agency, the power to prevent certain obstructions to commerce but, although a private party, employee, union or employer may incidentally benefit thereby, the Act does not provide a forum for the protection of the private interests of a private party. As the Supreme Court has pointed out, Board proceedings are not intended or designed for the protection of private interests but, rather, to vindicate the public interest. Amalgamated

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Utilities Workers v. Consolidated Edison, 309 U.S. 261, 265, 266; National
Ice Co. v. N.L.R.B., 309 U.S. 350, 362, 365. As that Court stated in the
Amalgamated Utilities Workers case, at pages 265-266:

The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.

* * *

What Congress said at the outset, that the power of the Board to prevent any unfair practice as described in the Act is exclusive, is thus fully carried out at every stage of the proceeding.

Because of the special nature of proceedings under the Act, and the distinction between public and private interests, the courts uniformly deny intervention in Board proceedings by private parties. See, e.g. N.L.R.B. v. Florida Citrus Fruit Carriers Corp., 288 F. 2d 630, 639-640 (C.A. 5); Aluminum Ore Co. v. N.L.R.B., 131 F. 2d 485 (C.A. 7). As the Court pointed out in Aluminum Ore, at page 488:

The union has asked leave to intervene. This proceeding is in the public interest, prosecuted by an authorized agency of the Government, in furtherance of an express policy and intent upon the part of Congress to establish, in behalf of the national public, a standard of conduct presumably productive of progress in protection of the public welfare. In such proceedings, private parties have no rightful place except as the court may desire to avail itself of helpful suggestions.

In N.L.R.B. v. Retail Clerks International Association, 243 F. 2d 77 (C.A. 9), Safeway Stores, Inc., the charging party in the proceedings before the Board, in the course of an application to discharge the Retail Clerks from judgment of civil contempt of a decree entered by this Court enforcing a Board order, filed with the Court a "petition requesting this Court to act to protect its decrees and its pending exercise of jurisdiction thereon by temporary injunctive relief pending its decision herein". The Court, denying this request stated (243 F. 2d at pp. 782-783):

In various proceedings in this case this Court has seen fit to permit Safeway to appear in oral argument and file briefs. When Safeway's petition for injunctive relief came in the picture, Clerks then insisted that Safeway should be restricted to appearing in this controversy in the role of amicus curiae. The Board filed a memorandum opposing the Safeway petition for injunctive relief; arguing that Safeway has no standing to petition this Court for injunctive relief under the National Labor Relations Act, as amended. This issue thus remained for decision at the time this case was finally submitted.

Safeway contends that it is "well established" that a person benefited by an order of the Board has standing "to invoke the aid of the appropriate federal court in proceedings subsequent to judicial enforcement of the Board order, where the Board has failed to take action required to protect the enforcement degree." It places primary reliance on International Union of Mine, Mill and Smelter Workers, Locals Nos. 15, 17, 107, 108, 111 (C.I.O.) v. Eagle-Picher Mining & Smelting Co., 1945, 325 U.S. 335, 65 S. Ct. 1166, 89 L. Ed. 1649.

We are of the view that Eagle-Picher is not authority for the proposition that Safeway has standing to seek the injunctive relief it demands. Eagle-Picher states that unions which had been permitted to intervene as parties in the lower court (also) had standing to petition for certiorari to seek review in the Supreme Court of an adverse decision, from which decision the Board did not take an appeal.

Safeway cites Stewart Die Casting Corporation v. N.L.R.B., 1942, 7 Cir., 129 F. 2d 481, to sustain its argument that it has standing to seek injunctive relief. While that case may provide some support for Safeway's position, a later decision in the same case makes it clear that the Seventh Circuit recognizes that only the Board has standing to prosecute proceedings in aid of its orders. Stewart Die Casting Corporation v. N.L.R.B. 1942, 7 Cir., 132 F. 2d, 801.

We reach the conclusion that Safeway has no standing to petition this Court for injunctive relief against what it alleges is conduct which violates the decrees of this Court. Amalgamated Utility Workers (C.I.O) v. Consolidated Edison Co. of New York, et al., 1940, 309 U.S. 201, 60 S. Ct. 561, 84 L. Ed. 738 (footnotes omitted).

A proceeding under Section 10(1), like proceedings under Section 10(e) of the Act in the courts of appeals to enforce Board orders as in the Safeway and the other cases cited above, is a proceeding in aid of a Board order; it is ancillary to the Board proceeding, designed to afford injunctive relief for the purpose of keeping the entire matter in status quo, and of preventing frustration of effective action by the Board." Building Trades Council, etc. v. LeBaron, 181 F. 2d 449, 450 (C.A. 9). And the charging parties have no more standing in Section 10(1) proceedings to secure an injunction than they do in a court of appeals proceeding to enforce a Board order under Section 10(e) of the Act. Section 10(1) does permit a charging party "to appear by counsel and present any relevant testimony" but, as the courts have held, this provision affords no basis for a charging party to intervene or otherwise participate as a party plaintiff. It is still the Board, and only the Board, which can secure injunctive relief, whether temporary under Section 10(1) or permanent under Section 10(e). For "the principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant." McLeod v. Mechanics Conference Board, 300 F. 2d 237, 242-243 (C.A. 2). See also: Meekins, Inc. v. Boire, 320 F. 2d 445 (C.A. 5); Phillips v. United Mine Workers, District 19, 8 F. Supp. 103 (E.D. Tenn.); Penello v. Burlington Industries, 54 LRRM 2165 (D. Va.); Shore v. Building and Construction Trades Council, 50 LRRM 2139 (D. Pa.).

B. The court below was without authority to grant an injunction at the request of the charging parties and over the Board's objections.

The principle that a district court may not grant injunctive relief in a proceeding under the Act, including a proceeding under Section 10(1) of the Act, unless such relief is requested by the Board, is grounded upon explicit statutory instruction. The Norris-LaGuardia Act 129 U.S. C.A. § 107, with exceptions not here relevant deprives the district courts of jurisdiction to issue injunctions in labor disputes. It is settled that when Congress, in enacting Section 10(1), returned to the district courts a measure of jurisdiction to issue injunctions in labor dispute situations such jurisdiction was limited to injunctions "obtained only at the instance of the National Labor Relations Board . . ." and not private litigants. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 204. See also, Meekins v. Boire, 20 F. 2d 445, 448-449 (C.A. 5); McLeod v. Mechanics Conference Board, 300 F. 2d 237, 242-243 (C.A. 2); Int'l Longshoremen's Union, Local 6 v. Sunset Line & Wine Co., 77 F. Supp. 119 (N.D. Cal.); Amazon Cotton Mills Co. v. Textile Workers Union, 176 F. 2d 183, 186-187 (C.A. 4) and cases therein cited. When Section 10(1) was first enacted, in 1947, Congress debated this very point and expressly rejected a House proposal to permit injunctions "at the request of private persons." House Conf. Rept. No. 510, on H.R. 3020, p. 57; 1 Legislative History of LMRA, 1947, p. 461. "Congress was intent upon taking the Federal courts out of the labor injunction business except in the very limited circumstances left open" Marine Cooks Union v. Panama S.S. Co., 362 U.S. 365, 369. See also Meekins v. Boire, 320 F.2d 445, 448 (C.A. 5); Dunn v. Retail Clerks, 307 F. 2d 285, 288 (C.A. 6). And, because the Norris-LaGuardia Act is "such a longstanding, carefully thought out and highly significant part

"this country's labor legislation" /Sinclair Refining Co. v. Atkinson, supra, 370 U.S. at 203⁷ the Supreme Court has consistently stricken down attempts to restrict, modify or dilute its impact by judicial interpretation. See, e.g., Sinclair Refining Co., supra; Marine Cooks, supra; United States v. Hutchinson, 312 U.S. 219; Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U.S. 311; New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552; Lauf v. Shinner, 303 U.S. 323. And see Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 805.

Congress has been specific where it intended to permit private litigants an exception to the Norris-LaGuardia ban. Thus, Section 302 of the Labor Management Relations Act /61 Stat. 157, 29 U.S.C., § 186⁷ prohibits certain employer payments to employee representatives and, in recognition of the unusually sensitive and important nature of the problem, expressly permits private litigants to seek an injunction without regard to Norris-LaGuardia. See § 302 (e), 29 U.S.C., § 186 (e). But this section "stands alone in expressly permitting suits for injunctions . . . by private litigants . . ." Sinclair Refining Co., supra, 370 U.S. at 205, n. 19. No additional exceptions should be implied by the courts, for the Norris-LaGuardia Act "leaves not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself." Sinclair Refining Co., supra, 370 U.S. at 202.

It seems too plain to warrant extensive argument that the charging parties cannot evade the prohibition of the Norris-LaGuardia Act, the statutory scheme of our Act, and the clear Congressional mandate by using a proceeding instituted by the Board as a vehicle to secure relief which the Board was not requesting and which they could not secure in an independent suit.

Finally, we think it is equally plain that the court below did not, and indeed could not, grant the injunction sua sponte. Although the Court

has the power and obligation to grant such relief as may be "just and proper", that necessarily means that he need not grant an injunction simply because the Board petitions for one, and he need not grant all the relief the Board might seek in a case if he felt such were not "just and proper"; but to construe the "just and proper" criterion so as to permit a court sua sponte to grant an injunction when the Board does not request one or to enjoin more than the Board seeks to enjoin, would in effect substitute the court for the administrative agency designated by Congress to enforce the Act, to determine initially whether there is reasonable cause to believe the Act is being violated, and to determine the appropriate remedy. This Court's observation in N.L.R.B. v. Lewis Food Co., 249 F. 2d 832, 838, affirmed 357 U.S. 10, is appropriate here:

By virtue of § 3 (d), 29 U.S.C.A. § 153 (d), the General Counsel has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." His decision on whether to issue a complaint charging an unfair labor practice is final and is not reviewable by either the Board or the courts. Lincourt v. N.L.R.B., 1 Cir., 170 F. 2d 306; Houriham v. N.L.R.B., 91 U.S. App. D.C. 316, 201 F. 2d 187; Anthony v. N.L.R.B., 6 Cir., 204 F. 2d 832. If he decides to direct issuance of a complaint, it is his responsibility to prosecute the matter. In this role also he exercises broad powers. International Union, etc. v. N.L.R.B., 9 Cir., 231 F. 2d 237, 242. Here then is an official who has life-or-death authority over the initiation of an unfair labor practice proceeding and who, if he determines that such proceedings should be commenced, is entrusted with the task of prosecution.

In short, we submit that although the court may curb the Board, within statutory limits and sound discretion, by narrowing the injunctive relief requested by the Board, it cannot on its own motion enjoin more than the Board seeks to enjoin. And this is consistent with the normal rule in injunction litigation between private parties. Although a court is not necessarily limited to the pleadings in granting relief but may grant such relief as appears

which neither party desires should not be forced on them." 6 Moore's Federal Practice, 2nd Ed., 1208.

- II. The court below erred in entering an injunction over the Board's objection which is too broad in its proscription.

There is, of course, no specific statutory prohibition outlawing the salutary method of resolving labor disputes by arbitration. On the other hand, it would seem that arbitration proceedings should not be utilized as a stratagem to enforce or maintain contractual provisions in a manner which makes the provisions unlawful under the Act. Conceivably, questions may arise under a particular provision which, as ultimately resolved by an arbitrator, will not have the effect which Section 8(e) is intended to prevent, i.e. an agreement by an employer that he would not do business with another employer. Conceivably, too, if the question is whether the parties had a meeting of the minds and actually intended that the employer would not do business with another employer, an arbitrator might find that there had been no meeting of the minds and, perhaps, no agreement to that effect. In sum, therefore, although arbitration may be enjoined "insofar as" the particular contractual provisions require conduct within the contemplation of Section 8(e), it should not be enjoined if there is no such object or effect. Any injunction against arbitration should delineate the unlawful conduct enjoined and should not be so broad as to include a proscription against possible lawful conduct.

Here, the original injunction, in section (a) thereof, enjoining arbitration, specifically limited the injunction in this respect by making it applicable only "insofar as Article I" required conduct unlawful under Section 8(e). Then, however, at the request of the charging parties and over the Board's objection, the court amended the order nunc pro tunc to add paragraph (c)

Director which was not so limited and which bans arbitration of "any issue or dispute arising out of the provisions of Article I" relating to work performed by employees of certain employers. We respectfully submit that as amended the injunction is too broad in scope and may improperly enjoin lawful conduct.

Moreover, here, too, the court erred in granting injunctive relief at the request of the charging parties, over the Board's objection. As we have demonstrated above, the Act and the Norris-LaGuardia Act preclude the grant of injunctive relief at the request of a charging party when the Board does not seek such relief. Obviously, this applies to broadening an injunction beyond one sought by the Board as well as to the grant of an injunction in the first instance. The observations of the Court of Appeals for the Second Circuit in McLeod v. Mechanics Conference Board, 300 F. 2d 237, 242-243, are pertinent:

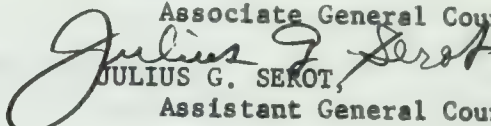
The charging party, Rand, contends the handbills distributed are untruthful and, therefore, not protected by the publicity proviso." Because the Regional Director has not relied upon this in his petition or argument, we believe the question governed not by section 10(1), but by the Norris-LaGuardia Act. We lack jurisdiction, therefore, to grant relief. Section 10(1) is operative only upon the filing of a petition by a Regional Director of the Board. This limitation was imposed in order to restrict the potential involvement of federal courts in labor disputes. For that reason, we do not read it to allow consideration of issues not raised by the Regional Director. To do otherwise would not only increase the danger of over-involvement on the part of the federal courts but would also ignore the expertise which section 10(1) commands us to attribute to the Regional Director. It is his view of the facts and law the district judge is to evaluate in a section 10(1) proceeding. The courts are not free to roam at will over every aspect of a labor dispute upon the request of the charging party. We are mindful of the fact the statute allows the charging party to appear by counsel and present relevant testimony. We believe, however, the principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant.

Although, we submit, under the Act it is the exclusive right of the Board to determine the relief to be sought, it might be noted in concluding that the stipulation tendered by the Board, as the Board demonstrated to the court below, fully and adequately protected the policies of the Act and, indeed, the interests of all concerned and was eminently appropriate in the circumstances. Thus, the Unions and Employers undertook flatly not to engage in conduct violative of Section 8(e); specifically agreed not to apply the alleged illegal contract provisions pending their arbitration; specifically agreed, further, that regardless of the arbitrator's determinations, they would not give effect to the provisions, even as interpreted, if the appropriate Board representative was of the opinion that the provisions, as interpreted, continued to violate Section 8(e); and agreed that in the event the Unions or Employers engaged in any conduct which in the opinion of the Board's representative was violative of the stipulation, an injunction could be entered without further hearing. The gravamen of Section 8(e) and of the petition herein was that the Unions and Employers had made and were maintaining and giving effect to a contract which would result in a cessation of business between the Employers and other employers. But by the stipulation they undertook not to cease doing business pursuant to the contract pending litigation of the issues. There was, thus, in reality nothing to enjoin at this time - and there was the added safeguard that if it ever appeared that the unlawful conduct had been resumed, an injunction which of course would then be warranted, could be entered without further hearing.

we respectfully submit that for the reasons set forth above the court below committed reversible error and the judgment of the court below should be reversed and the case remanded for the entry of an order approving stipulation.

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JULIUS G. SEROT,
Assistant General Counsel,

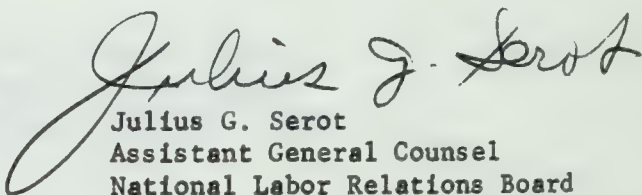
MARVIN ROTH,
FRANK H. ITKIN,
Attorneys.

National Labor Relations Board

July 1965.

C E R T I F I C A T E

THE UNDERSIGNED CERTIFIES THAT HE HAS EXAMINED THE PROVISIONS OF RULES 18 AND 19 OF THIS COURT AND IN HIS OPINION THE TENDERED BRIEF CONFORMS TO ALL REQUIREMENTS.


Julius G. Serot
Assistant General Counsel
National Labor Relations Board

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 20201

RETAIL CLERKS UNION,
LOCALS 770, 137, 905 and 1222,

Appellants,

AND

RALPH E. KENNEDY, REGIONAL DIRECTOR
OF THE 21ST REGION OF THE
NATIONAL LABOR RELATIONS BOARD, ETC.,

Appellant,

VS.

FOOD EMPLOYERS COUNCIL, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR AMICI CURIAE AMERICAN RESEARCH
MERCHANDISING INSTITUTE, U. S. SERVATERIA
CORPORATION AND WESCO MERCHANDISING CO.

FILED

AUG 20 1965

FRANK H. SCHMID, CLERK

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I. JURISDICTIONAL STATEMENT

This is an appeal from the District Court's order granting a temporary injunction brought by the Petitioner below, the Regional Director of the Twenty-first Region of the National Labor Relations Board, one of the appellants herein, as well as by various union-appellants [Tr. 201; 221-224]. Amici curiae American Research Merchandising Institute, U. S. Servateria Corporation and Wesco Merchandising Co. were granted permission to appear by order of this Court dated July 2, 1965, as corrected on July 14, 1965.

II. STATEMENT OF THE CASE

These amici, along with amicus curiae Joint Counsel of Teamsters No. 42 (hereinafter referred to as Teamsters), urge, contrary to the contention of Appellants, that the District Court acted properly in granting an injunction order as originally prayed for by the Appellant Regional Director. A complete factual analysis of the evidence and Statement of the Case is set forth in Amicus Curiae Teamsters Brief (pp. 2-14), and these amici adopt and herein incorporate that Statement of the Case.

III. ARGUMENT

A. Preliminary Statement

The crux of Appellants' arguments to this Court is that the District Court is precluded from exercising its discretion and issuing an injunction notwithstanding the evidence before the District Court (presented not only by the Charging parties but by the Appellants themselves), the various admissions made by certain Appellants as to the true reason for seeking arbitration and the legal admission by the Appellant Regional Director that such an arbitration, per se, would be violative of the National Labor Relations Act, and, finally, the Appellant Regional Director's verified Petition filed with the Court below alleging that an injunction is necessary to effectuate the purposes and comply with the dictates of the Act.

While the posture of the record in this case, as a matter of fact as well as law, fully justifies the action of the Court below, it is well to point out initially the strange irony created by Appellants' arguments. This Court, in a case involving virtually all the same parties and clearly dealing with the same underlying dispute, Frito Company v. NLRB, 380 F. 2d 458 (1964), pointedly rejected the strained rationale and limited theory of labor law jurisprudence as Appellants

gain urge in the instant case:

In Frito, the General Counsel initially issued a complaint which intended to grant full relief to the charging parties. In the instant case, the Regional Director initially sought an injunction which would have fully protected the charging parties herein.

In Frito, the General Counsel subsequently amended his complaint so as to permit the Unions to continue the subject unfair labor practices. Here, the Regional Director, after filing a Petition seeking an injunction, changes his stance, no longer requests an injunction, but urged the Court below to sanction a stipulation which, by the Regional Director's own prior admission would permit (indeed, encourage) the Unions to commit unfair labor practices of the same nature.

In Frito, the evidence, as presented by the charging party, justified a broad order that would have permitted a meaningful policy decision in accordance with the dictates of the Act and would fully protect innocent parties. In the instant case, the charging parties presented evidence to the Court below which justified a meaningful injunction along the lines originally sought by the Regional Director and which would prevent any further unfair labor practices and enable the charging parties to obtain a full measure of protection.

In the Frito case, the National Labor Relations Board took the position in administrative proceedings and before this Court that though the evidence might justify a broader order than the Board was willing to grant, the Board was precluded from affording the charging parties any further relief because the General Counsel did not seek to grant the charging parties the full measure of protection. Here, though the Regional Director originally admitted that the Appellant Unions' effort to seek arbitration would be a violation of the Act and though the evidence quite clearly shows that the Appellant Unions seek to achieve by compelling arbitration what has been denied to them under the Act¹, the District Court, say Appellants, is precluded from weighing the evidence and exercising its discretion

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Not only has the Regional Director in his Petition alleged that he had "reasonable cause" to believe that certain provisions of Article 1 of the Collective Bargaining Agreement between the Clerks and the Employers violated Section 8(e) of the Act (Tr. 13-14, Par. 5 (j); Tr. 1-12, Par. 4 (j)) but, in addition, subsequently the Trial Examiner for the National Labor Relations Board on July 23, 1965, after a hearing in the matter, Case No. 21-CE-37, held that the same provision of the collective bargaining agreement did, in fact, violate Section 8(e) of the Act.

In the premises because the Regional Director, for some enigmatic reason, now seeks to deny the charging parties a full measure of protection and now seeks to ignore his prior admissions.

In Frito, this Court clearly and specifically held that once the General Counsel has issued a complaint he "has embarked upon the judicial process" and that thereafter evidence having properly been placed before the Board to justify the full measure of protection that could be afforded the charging parties, the Board was "free to consider the evidence and to exercise judicial discretion" so as to permit a broader scope of relief than asked for by the General Counsel. (Twenty-Ninth Annual Report of the National Labor Relations Board, p. 112 (1964)). Here, the Regional Director was required by law to seek an injunction. Once having done so, he is not free to act in derogation of his duty by the "simple" shift of seeking a stipulation in lieu of an injunction when, in point of fact based upon the evidence and his own admissions, anything else but an injunction would fail to afford the relief necessary to effectuate the policies of the Act. Having embarked "upon the judicial process" which in this case is now delegated to the court, as a judicial not a ministerial function, the court not only had the right but the duty to exercise that judicial function.

The District Court's duty, in this context and by statute, is no less a judicial one than the Board's duty in Frito. The Court is directed by Congress to perform a judicial act; to exercise discretion; to grant relief as the evidence dictates. To do less is to negate the mandate of Section 10 (1) of the Act; to do differently is to relegate the District Court to the role of a process server rather than a server of the judicial process.

B. The Court Below had The Jurisdiction, Authority and Duty, in Light of the Evidence and the Petition, to Issue an Injunction Under Section 10 (1) of the Act.

There can be no question that under Section 10 (1) of the Act (61 Stat. 136 (1947), 29 U. S. C. §160 (1)) the Board, once it has "reasonable cause to believe" that certain types of unfair labor practices are being committed, must petition the District Court for appropriate injunctive relief pending a final adjudication of the Board in respect to such mandate; the Regional Director is not granted discretion in these circumstances; he is required to seek an injunction. This clear dictate of the Act has long been recognized by the Board, Congress and the commentators. See Chairman McCullough's Remarks, Joint Industrial Relations Conference of Michigan State University, April 19, 1962, in 49 L.R.R.M. 74, 81 (1962);

Summary of Findings and Conclusions of the Subcommittee on the National Labor Relations Board of the House Committee on Education and Labor, 87th Cong., 1st Ses. (1961); Comment, 11 U. Pa. L. Rev. 460, 465 (1953).

Section 10(1) itself quite clearly states that, upon the filing of a petition before the Regional Director, as in the instant case,

"the District Court shall have jurisdiction to grant such injunctive relief . . . as it deems just and proper."

The Act, therefore, must be interpreted in the same way as this Court in the Frito case recognized the duties of those involved in the judicial process. There the Court stated (330 U. S. 2d at 363-64):

"It is now well settled that the General Counsel's decision to investigate a charge or issue a complaint is unreviewable by the Board. However, once the decision has been made to issue a complaint and to prosecute it, the General Counsel has embarked upon the judicial process which is reserved to the Board."

As applies to the General Counsel, once he has "embarked upon the judicial process", he may not limit or direct the Board in its exercise of the judicial process, the Regional Director in the instant case may not limit the Court's function. There being reasonable cause for the Regional Director to file a Petition for an injunction, the Court is under a statutory dictate to

the part of the Regional Director. The Court is not, in this context at least, an agent of the Regional Director.

Appellants can hardly deny that the Court may exercise judicial discretion in both issuing or not issuing an injunction and in the substantative matter of any injunction. The language of the Act, its legislative history and case law is too clear to deny the Court this authority. And in light of the record and evidence before the District Court, as will be pointed out below, there can be no real contention that the Court did not properly exercise its authority. Appellants, however, seek to detour the issue away from the District Court's authority by arguing that the Court was unduly influenced by the charging parties who by their bete noir interference unduly influenced the Court; and since, admittedly, these charging parties had no standing to sue for an injunction, the Court relying upon their evidence and presentation, in effect, brought about a violation of the Norris-LaGuardia Act.

Such a contention, however, may easily be disposed. The charging parties are not officious intermeddlers. Congress, in the second proviso to Section 10 (1), specifically granted the charging parties the right to be heard before the District Court in a 10 (1) proceeding:

"Upon the filing of any such petition [for injunctive relief under Section 10 (1)], the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony."

issue an injunction order within the scope of that requested in the Petition of the Regional Director. Here, in accordance with the rights granted them under Section 10 (1) of the Act, the charging parties appeared by counsel, made germane arguments to the Court, and were, indeed, the only ones presenting relevant testimony in regard to the propriety of the injunction. To urge, as Appellants indirectly do, that the charging parties may not by such arguments and such evidence attempt to influence the District Court as to the proper action that should be taken is to offer charging parties a meaningless choice: to remain mute, or to merely echo the Regional Director or to make points and be "heard" but not be listened to. As a matter of law, these Hobson Choices were not intended under Section 10 (1). See Phillips v. U M W, District 19, 218 F. Supp. 103, 106 (E.D. Tenn., 1963), where the court said:

"The denial of the right to intervene does not however mean that the charging party is wholly without right to be heard or that the Court will ipso facto disregard any and all legal contentions advanced by the charging party in this proceeding."

This is particularly true in the posture of this case where the only voices urging that the statute and the law be followed were the charging parties.

Proper"; There Was Virtually No Evidence To Show That It Was Arbitrary.

In the Regional Director's verified petition brought under Section 10(1), he noted that a prior 10(1) proceeding had been brought but was dismissed upon the Clerks' stipulation that they would refrain from "maintaining, giving effect to, or enforcing Article I" of the collective bargaining agreement in question insofar as that Article would have the effect of requiring Employers to cease doing business with the charging parties and other persons (Tr. 15, Par. 6, Tr. 45, Par. 2 (a)). The Regional Director's petition further alleged that the Clerks violated this stipulation by demanding arbitration as to whether the Clerks' inability to enforce Article I had the effect of requiring a renegotiation of the entire agreement or, in the alternative, whether the Clerks were free to strike the Employers because of the latter's inability to enforce Article I (Tr. 56-57). The Regional Director alleged and argued that this arbitration demand violated Section 8(e) of the Act. (Tr. 16-17, Par. 9) The Regional Director has never presented any evidence to the contrary. He has never sought to amend his petition and has never represented to the Court that such a demand for arbitration or such an arbitration is not violative of the Act. He has limited his representations to the Court to the assertion that he has been given "assurances" that the arbitration award would not be put into effect unless he first approves it.

waivered from his allegation, supported with ample authority, that an arbitration, of the nature sought by Appellant Unions, would violate the Act. (May 10 Transcript, p. 17, l. 15-18; p. 33, l. 7-18; Tr. 168, l. 20-23; June 14 Transcript p. 50, l. 7-11)²

Nor can it be realistically argued that the attempt to enforce arbitration avoids the prohibition of Section 8(e) because it purportedly is limited to grievances claimed as a result of the unenforceability of the illegal clauses of Article I. In effect, this forced arbitration was designed either to void the entire contract or to release the Clerks from their no-strike pledge contained therein. But such an objective, in the context of an 8(e) dispute has been held by this Court to be violative of the Act. In NLRB v. Amalgamated Lithographers, 309 F.2d 31 (9th Cir. 1963), the lithographers had a "trade shop" clause which was found to violate Section 8(e), and although the employers were not required to live up to this clause, if they did not do so the

²Among the cases in point cited by the Regional Director in support of the proposition that demanding and engaging an arbitration with respect to clauses that are violative of Section 8(e) is itself violative of Section 8(e) are: Hillbro Newspaper Printing Co., 135 NLRB 1132, enforced, Los Angeles Mailers Union v. NLRB, 311 F.2d 121 (D.C. Cir. 1962) (reaffirming hot cargo clause is "entering into" it), Kennedy v. Service Employees Union, Civil No. 63-490-JWC (S.D. Cal. 1963) (arbitrating is equivalent to giving effect to unlawful clause), McLeod v. American Fed'n of Television Artists, 234 F. Supp. 832 (S.D.N.Y. 1964) (ibid.)

lithographers were free to open the contract. Concluding that under this provision "the employer agrees that he will deal with non-union employers only at the risk of giving up all of his benefits under his contract," 309 F.2d at 36, the Court found this tactic to be unlawful. The Board, too, had dealt with such subterfuges and has uniformly condemned them. See, e.g., Arthur J. Galligan, 148 NLRB No. 31, 56 L.R.R.M. 1471, 1472, 1964 CCH NLRB ¶13,334 at pp. 21, 295-96 (1964) (imposition of financial penalty on employer who purchases coal from non-union company). And in Brown Transport Corp., 140 NLRB 1436 (1963), set aside on other grounds, 334 F.2d 539, 548-49 (D.C. Cir. 1964), the Board said of a "hazardous work clause" which permitted the contract to be reopened for additional benefits if the employees were required to handle "hot cargo":

"It is a method for making it difficult and expensive, and unlikely for an employer signatory to the agreement to insist that his employees handle 'hot cargo' goods or equipment." 140 NLRB at 1439.

It is gainsay that the Employers who would be dragged into such an arbitration have nothing to gain but risk either their entire contract or suffer strike activity. Their only alternative, assuming such were possible, is to "voluntarily" put into effect the illegal clauses of Article I. Such an "urging" on the part of the Clerks is in itself a form of pressure that is unlawful. Met with the "facts of life" and the evidence supplied by the head of one of the

clerks' unions have emphasized the illegal objective being sought by the Clerks (See Exhibit 2, p. 1, column 1, 2; p. 2, column 3; p. 3, column 2. And see May 10 Transcript, p. 40, l. 1-8; p. 42, l. 20-24), the District Court, in a proper exercise of judicial discretion, would not permit itself to sanction such a ruse or encourage or be an ally to such further violations of the Act.³

The Court below recognized the sham for what it is: an attempt to compel compliance on the part of the Employers with the unlawful clauses or to face the unenviable but inevitable alternative of arbitrating the existence of the entire collective bargaining agreement under a strike threat. The Court, for one, recognized that it was enforcing public rights and that through the guise of the stipulation proposed, these public rights were being undercut. It exercised, based upon the record and the evidence before it, proper judicial discretion. Its order, in accordance with the dictates of the Act, was just and proper. The only "evidence" in opposition to the Court's action was the "assurances" given by the Clerks to the Regional Director. This, as a matter of law and fact, was patently insufficient to permit a violation of the Act.

³ Arbitration itself under these circumstances constitutes an unfair labor practice and such proceedings have been enjoined at the request of the Board. McCleod v. American Fed'n of Television Artists, 234 F. Supp. 832 (S.D.N.Y. 1964)

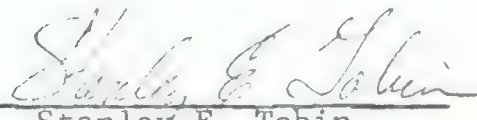
The Regional Director should not properly have accepted the "assurances" of the Clerks; the statute dictates the Regional Director seek an injunction. At any rate, however, as the court in Madden v. Milk Wagon Drivers Local 753, I.B.T., 229 F. Supp. 490 (D.C.N. Ill., 1964) stated, district courts are not to be "rubber stamps" in 10(1) proceedings. The Court below is not a "rubber stamp"; it need not have accepted the "assurances" of the Clerks.

For the reasons set forth herein, the District Court properly enjoined the arbitration and its order should be affirmed.

DATED: August 19, 1965

Respectfully submitted,

HILL, FARRER & BURRILL
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I hereby certify under penalty of perjury that copies of Brief for Amici Curiae American Research Merchandising Institute, U. S. Servateria Corporation and Wesco Merchandising Co., in the matter of Retail Clerks Union, Locals 770, 137, 905 and 1222, Appellants, and Ralph E. Kennedy, Regional Director of the National Labor Relations Board, etc., Appellant, vs. Food Employers Council, Inc., Appellee, have been sent first-class mail, postage prepaid, this 19th day of August, 1965, to:

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In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMBROSE DISTRIBUTING COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD

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FILED

AUG 24 1965

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 20200

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMBROSE DISTRIBUTING COMPANY, RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),¹ for enforcement of its order issued against Ambrose Distributing Company (herein called respondent) on February 9, 1965, following the usual

¹ The pertinent statutory provisions are printed as an appendix, *infra*, pp. 15-17.

proceedings under Section 10(c) of the Act. The Board's decision and order (R. 34)² are reported at 150 NLRB No. 157. This Court has jurisdiction under Section 10(e) of the Act, the unfair labor practices having occurred in Wendell, Idaho where respondent maintains a trucking terminal.³

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that respondent violated Section 8(a)(1) of the Act by interrogating and threatening employees concerning their union activities and promising them benefits for refraining from such activities. The Board further found that respondent violated Section 8(a)(3) and (1) of the Act by discharging two employees to discourage union activities. The facts underlying the Board's conclusions are as follows:

² References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. References designated "GCX" are to exhibits of the General Counsel. Whenever in a series of references a semicolon appears, those references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

³ The complaint alleges and the answer admits that "A. N. Ambrose is, and has been at all times material herein, an individual proprietor doing business under the trade name and style of Ambrose Distributing Company" (R. 5, 9, 19). Ambrose is a wholesale distributor of meats and Texaco petroleum products and also hauls freight as a private carrier truck line. No jurisdictional issue is presented.

A. The interference, restraint, and coercion

Approximately 38 truckdrivers work out of respondent's terminal in Wendell, Idaho (R. 19; Tr. 10-11). In September 1963, Richard Byrd, one of these drivers, joined the Union⁴ (R. 19; Tr. 11). Thereafter, until mid-November, he solicited other drivers to join the Union (R. 19; Tr. 12). On December 12, 1963, the Union filed a representation petition and, on February 18, 1964, the Board conducted an election which the Union lost (R. 19; Tr. 4-5).

In mid-December 1963, A. N. Ambrose, the Company's owner, asked Thomas Smith, a driver, what he thought of the "union situation" and cautioned him: "Now, whatever you fellows do, don't vote for the union" (R. 20; Tr. 63). Thereafter, about the middle of January 1964, Ambrose told Smith that he had been thinking for some time about establishing a fund for permanent employees and, although he could not promise to do so, he was considering instituting such plan should the Union be defeated (R. 20; Tr. 63-64).⁵ In early February, Ambrose told Smith that he was going to stop operating the trucks for a period of two weeks until the election was over (R. 21; Tr. 64-65). He then predicted: "Well, if this causes me to lose my Buttrey run, I've

⁴ General Teamsters, Warehousemen, Chauffeurs & Helpers Union, Local No. 483, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Independent).

⁵ Byrd was present when this conversation occurred and his testimony corroborates Smith's (R. 20 n. 4; Tr. 42-43).

got eight trucks sold in Utah . . .” (R. 21; Tr. 65). In mid-February, just prior to the election, Manager Nolan Cooper, told employee Ernest Bartee that, if the Union won the election, respondent would reduce its operations so that not more than five trucks would be kept running (R. 19; Tr. 92). A day or two after the election, Cooper told Bartee that he had a list of 15 drivers he thought voted for the Union. He said he would have to cross off four names since the Union received only 11 votes. Cooper threatened that those on the list would be “sent down the road” (R. 19; Tr. 94). All of the foregoing evidence is substantially⁶ uncontradicted (R. 20).

B. *The discharges*

Richard Byrd—On January 4, 1964, Cooper accused Byrd of being the “instigator of this union business” and said that he had had “two guys in [his office] that swore that [Byrd] signed them up” (R. 19; Tr. 14). About January 20, while Byrd was talking to employee Gene Kuhn in the shop at Wendell, Ambrose approached them and cautioned Kuhn: “Be careful what you say, Byrd is going to be the new shop steward in the union” (R. 20; Tr. 16).

In January, Byrd narrowly avoided colliding with another vehicle and scraped his trailer against a guardrail of a bridge, but the only damage was some scratches in the paint (R. 20; Tr. 38-40). Byrd

⁶ Ambrose did deny in general terms that he had ever threatened to curtail operations if the employees joined the Union (R. 21, n. 7; Tr. 111).

mentioned the incident to shop employees at Wendell, and Ambrose learned of it through them (R. 20; Tr. 40-42). On the occasion in mid-January when Ambrose spoke to Byrd and Smith concerning the possibility of establishing a fund for permanent employees should the Union be defeated, Ambrose volunteered that he was a fair man and would not bear resentment against an employee who had signed a card designating the Union as his bargaining representative (R. 20; Tr. 43). Ambrose went on to say that, if this were not so, he could have used the scratched-paint incident to discharge Byrd (R. 20; Tr. 43).

In February, Ambrose told Smith that he could not understand why Byrd was for the Union considering the help he had given Byrd in the past⁷ (R. 21; Tr. 66). After the election, when Cooper showed employee Bartee the list of employees he suspected were union sympathizers, Bartee noted that the names of Byrd and Smith were included (R. 19; Tr. 93). At this time, Cooper told Bartee that Byrd and another driver, S. C. ("Dutch") Dillon, were promoting the Union (R. 19-20; Tr. 94). In late February, about a week after the election, Cooper upbraided Byrd for stirring up trouble and for reporting to an investigating Board agent what Cooper had said to Byrd about the Union (R. 20; Tr. 20-22). Cooper accused Byrd of not having enough courage to fight

⁷ In various business arrangements, respondent had extended credit and assistance to Byrd (R. 19; Tr. 109-110).

his own battles and of having to call in outsiders for help (R. 20; Tr. 22).

In early March, Byrd and another driver left a trailer at respondent's yard in Butte and proceeded on to other destinations (R. 20; Tr. 25-26). On March 11, Ambrose telephoned Byrd and asked him if he had delivered a trailer of grain to Butte (R. 20; Tr. 23). When Byrd said that he had, Ambrose told him that he had not properly lowered the landing gear on the trailer, that, as a result, the trailer had been damaged, and that it had taken five hours to jack the trailer up to its proper position (R. 20-21; Tr. 23). Byrd asserted that the trailer had been correctly uncoupled from the tractor and was safely set when he left it (R. 21; Tr. 23). Despite Byrd's denial, Ambrose said that, considering the quality of the work Byrd had been doing recently and the fact that he had struck a bridge sometime earlier, he was discharged (R. 21; Tr. 23). At this point, Byrd became angry and called Ambrose a liar, asserting that Ambrose knew he had not damaged any trailer in Butte (R. 21; Tr. 23). Ambrose replied: "Well that doesn't make any difference. I've got about five guys up here that will swear that you did" (R. 21; Tr. 24). Ambrose then said that he should have been given some help when he needed it and that Byrd, in consideration of all that had been done for him in the past, was one who should have supplied it (R. 21; Tr. 24). Byrd has not since worked for respondent (R. 21; Tr. 109).

Thomas Smith—In late February or early March, Smith was given a driving assignment which he said

he could not accept because he had no money (R. 21; Tr. 67). When Ambrose telephoned him to inquire about the difficulty, Smith explained that several pay and expense checks were due him and that part of the expense money given him had been spent for groceries (R. 21; Tr. 67-68). At Ambrose's direction, Smith went to the Wendell terminal (R. 21; Tr. 68). There, Ambrose accused him of causing trouble. When Smith questioned what trouble he had caused, Ambrose referred to the "union deal." Smith rejoined that no one knew how he had voted or would ever know. (R. 21; Tr. 68-69.) After some further discussion, Ambrose made a personal loan to Smith of \$200 (R. 21; Tr. 69).

About the middle of March, while driving a truck in Canada, Smith jackknifed the trailer, causing damage which Smith estimated would take less than \$200 to repair (R. 21; Tr. 70-72). Smith telephoned his dispatcher in Butte who instructed him to continue his trip (R. 21; Tr. 72). About March 18, Smith arrived in Butte, and after the truck was repaired, Smith delayed in the Butte office waiting for an expense check (R. 21; Tr. 72-74). Ambrose instructed Smith to proceed to Wendell, assuring him that he would bring the check down in a day or two, adding "You won't be going out before Sunday, anyway" (R. 21; Tr. 74).

On Saturday, March 21, Smith met Ambrose at the Wendell office (R. 21-22; Tr. 75). Ambrose said: "Tom, you sure have me in a bind." Smith asked how that was so and Ambrose explained: "You know

I fired those fellows the other day that dropped that trailer up in Butte." Smith acknowledged that he had heard about it. Ambrose then proceeded to say, in effect, that, if he did not now discharge Smith, the Union would force him to take the other men back to work. (R. 22; Tr. 75-76.) Ambrose suggested that although he was discharging Smith, he would arrange for Smith to continue work by hauling hay in Smith's own truck. After several further conversations, in which Ambrose allayed Smith's fears that there would be insufficient business to make such a venture profitable, Smith purchased a truck and readied himself for this work. When, about the middle of April, he telephoned Ambrose and reported that he was prepared to start hauling, Ambrose informed him that he did not think there would be any hay for him to haul. This was the last conversation Smith had with Ambrose. (R. 22; Tr. 76-79.)

II. The Board's Conclusions and Order

On these facts, the Board concluded that respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their union activities, threatening them with reprisals for engaging in such activities, and promising them benefits for refraining from such activities (R. 23, 24, 34). The Board also concluded that respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Byrd for his union activities and by discharging em-

⁸ Although, according to Smith's testimony, Ambrose used the plural, there is no evidence that anyone other than Byrd was fired.

ployee Smith "because of [its] fear that failure to take this action might strip from the discharge of Byrd the mantle of legality with which [it] had sought to clothe [that discharge]" (R. 23, 24, 34).

Accordingly, the Board ordered respondent to cease and desist from the unfair labor practices found and in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act. Affirmatively, the Board ordered respondent to offer full reinstatement to Byrd and Smith, to make them whole with backpay plus interest, and to post the usual notices (R. 25-26, 34).

ARGUMENT

I. Substantial Evidence on the Record as a Whole Supports the Board's Finding That Respondent Violated Section 8(a)(1) of the Act

The evidence summarized above, pp. 3-9, establishes that, both before and after the election, respondent unlawfully attempted to undermine its employees' support of the Union. Thus, about the time that the Union filed its representation petition with the Board, Ambrose himself coercively interrogated employee Smith concerning union activities and cautioned him: "Now, whatever you fellows do, don't vote for the Union" (R. 20; Tr. 63). Thereafter, Ambrose sought to induce the employees to abandon the Union by suggesting that a fund for permanent employees would be established if the Union was defeated in the election and by threatening that large-scale layoffs would occur if the Union won. Man-

ager Cooper also threatened the retaliatory dismissals of all those who voted for the Union. That such conduct constitutes interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act is too well settled to require extended discussion. *N.L.R.B. v. Action Wholesale Company, Inc.*, 342 F. 2d 798 (C.A. 9), enforcing 145 NLRB 627; *N.L.R.B. v. Kit Manufacturing Company*, 292 F. 2d 686, 688 (C.A. 9); *N.L.R.B. v. California Compress Co.*, 274 F. 2d 104, 106 (C.A. 9); *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F. 2d 705, 707-708 (C.A. 9); *Carpenteria Lemon Assn. v. N.L.R.B.*, 240 F. 2d 554, 558 (C.A. 9), cert. denied, 354 U.S. 909; *N.L.R.B. v. Parma Water Lifter Co.*, 211 F. 2d 258, 261-263 (C.A. 9), cert. denied, 348 U.S. 829.

II. Substantial Evidence on the Record as a Whole Supports the Board's Finding That Respondent Violated Section 8(a)(3) and (1) of the Act

A. Byrd's discharge

The Board's finding that respondent discharged employee Byrd because of his union activities is amply supported by the record. Byrd spearheaded the union drive at the Wendell terminal, and Ambrose was fully aware of this fact. Manager Cooper told Byrd and, later, another employee, that Byrd was the union instigator or promoter (R. 19-20; Tr. 14, 94). Ambrose also complained to Smith of what he considered to be Byrd's disloyalty and ingratitude in supporting the Union (R. 21; Tr. 66), and Cooper upbraided Byrd for cooperating with a Board agent assigned to investigate alleged interference with the

employees' organizational rights (R. 20; Tr. 20-22). Cooper also threatened that the union adherents would be "sent down the road" (R. 19; Tr. 94), and Ambrose warned Byrd that his union activities might result in a discharge were Ambrose not a "fair" man (R. 20; Tr. 43). Subsequently Byrd was summarily discharged.

Respondent contends that Byrd was not discharged for his union activities but because he damaged a trailer by improperly lowering its gear when he deposited it at respondent's yard in Butte. Other than Ambrose's testimony, however, the record contains no evidence that any trailer was, in fact, damaged and the Trial Examiner generally discredited him as a witness (R. 22, n. 8). In addition, if an investigation had been made of the incident, it would have shown that Byrd was the "second driver" on the run in question and, therefore, that he was not solely responsible for uncoupling the trailer (Tr. 24-25).⁹ Moreover, the alleged damage was not discovered until a week after the trailer had been parked at the yard (Tr. 108) and, thus, it was quite possible that any damage resulted from some cause other than the initial adjustment of the landing gear.

Even if the Company had reason to believe that a trailer was damaged due to negligence on Byrd's part, it is clear that respondent used this circumstance as a pretext to rid itself of the man it correctly identified as the key union supporter at the Wendell terminal. When Ambrose telephoned Byrd

⁹ There is no evidence that any disciplinary action was taken against the "first driver."

and told him that he had damaged the trailer deposited in Butte, Byrd denied that he had and asserted that the trailer had been properly uncoupled and was set safely at the time he left it. Despite Byrd's denial, Ambrose proceeded to discharge him. After Byrd accused Ambrose of knowing that he had not damaged the trailer, Ambrose rejoined: "Well, that does not make any difference. I've got about five guys up here that will swear that you did" (R. 21; Tr. 24). Ambrose then "made a short statement about of all the people that should have helped him when he needed help, [Byrd] was one that certainly should have" (R. 21; Tr. 24). This concluding comment was an obvious reference to Byrd's support of the Union. Ambrose's remarks, which were established by uncontradicted testimony, clearly show that he was determined to effect Byrd's discharge no matter where the fault, if any, lay in connection with trailer damage and that the discharge was in retaliation for Byrd's union activities.

In view of respondent's attempts to defeat its employees' organizational efforts, the knowledge of Byrd's leadership of those efforts, and the circumstances of his discharge, we submit that the Board properly rejected respondent's explanation for the discharge and found instead that the discharge was discriminatorily motivated. *N.L.R.B. v. Argentum Mining*, 296 F. 2d 219 (C.A. 9), enforcing 129 NLRB 439; *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F. 2d 705 709-710 (C.A. 9); *N.L.R.B. v. Homedale Tractor & Equipment Co.*, 211 F. 2d 309, 313-314 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B. v.*

Dant & Russell, 207 F. 2d 165, 166-167 (C.A. 9); *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902, 907 (C.A. 9).

B. *Smith's Discharge*

As stated above, the Board found that Smith was discharged in order to lend credence to respondent's asserted reason for discharging Byrd. When Smith arrived in Butte following the accident in which his trailer had been damaged, Ambrose gave no hint that any disciplinary action would be taken. Smith was simply instructed to proceed to Wendell and wait for his check which would be delivered before he was dispatched again. When, three days later, Smith was summarily discharged, Ambrose made no attempt to justify the action on the ground that Smith was at fault in the accident. Rather, he admitted that he was forced to discharge Smith because, unless he did so, it might appear that he had discriminated against Byrd and, thus, he might be pressured into reinstating him. Since respondent openly confessed an unlawful motive for Smith's discharge—that is, to give “an appearance of legitimacy” to the discriminatory discharge of Byrd—the Board properly found that the dismissal of Smith was also a violation of Section 8(a)(3) and (1) of the Act. *N.L.R.B. v. Superex Drugs, Inc.*, 341 F. 2d 747, 749 (C.A. 6); *Wonder State Mfg. Co. v. N.L.R.B.*, 331 F. 2d 737, 738 (C.A. 6); *N.L.R.B. v. Williams*, 195 F. 2d 669, 672 (C.A. 4), cert. denied, 344 U.S. 834.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be enforced in full.

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August 1965

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall

be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

The following table of exhibits is presented pursuant to Rule 18(f) of the Rules of the Court. References are to the typewritten transcript of testimony ("Tr.") :

EXHIBITS—GENERAL COUNSEL

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>	<u>Withdrawn</u>
1-a—1-i	3	3	4	
2	4	3	4	
3	19	19		20

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMBROSE DISTRIBUTING COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE RESPONDENT

WESTON & WESTON,
Attorneys for Respondent
Ambrose Distributing Co.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMBROSE DISTRIBUTING COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the
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Attorneys for Respondent
Ambrose Distributing Co.

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AUTHORITIES CITED

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In the United States Court of Appeals
for the Ninth Circuit

No. 20200

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMBROSE DISTRIBUTING COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE RESPONDENT

JURISDICTION

Respondent agrees with the Petitioner's statement on jurisdiction.

STATEMENT OF THE CASE

The Board found that the Respondent herein, Ambrose Distributing Company, violated Section 8 (a) (1) of the Act by interrogating and threatening employees concerning their union activities, and promising them benefits for refraining from such activities. The Board also found that the Respondent violated Sections 8(a) (3 and (1) of the Act, by

discharging two employees, discouraging union activities.

The employer, Respondent herein, Ambrose Distributing Company, employs approximately thirty-eight truck drivers, located at Respondent's terminal in Wendell, Idaho (R. 19; Tr. 10-11). Sometime in September, one of the complainants, Richard Byrd, who was then employed by the Respondent, joined the Teamsters union. (R. 19; Tr. 11) The transcript indicates that thereafter and up until mid November, Mr. Byrd solicited other drivers to join this union (R. 19; Tr. 12). On December 12, 1963, the union filed a representation petition, and on February 18, 1964, the Board conducted an election which the union lost (R. 19; Tr. 4-5).

The Petitioner takes the position that certain statements allegedly made by Mr. Cooper, a supervisory personnel of the Respondent, and Mr. A. N. Ambrose, the owner of the company, have, in effect, interfered, restrained and coerced Respondent's employees, contrary to Section 8 as stated above. The first of these is a statement allegedly made by Mr. Ambrose in mid December of 1963. This statement was made to one Thomas Smith, a driver, wherein Mr. Smith was asked what he thought of the "union situation." (R. 20; Tr. 63). It was then brought out that Mr. Ambrose allegedly stated, "Now, whatever you fellows do, don't vote for the union." (R. 20; Tr. 63)

Counsel for the General Counsel has stated that

certain remarks made by the owner of Respondent herein, Mr. A. N. Ambrose, amounted to a threat that he was going to close the establishment for a period of two weeks while the election was being conducted (R. 21; Tr. 64-65). Counsel for the General Counsel construes this as a threat. Comment was also made that the statement of Mr. Ambrose that if there is a loss of the "Buttrey run" he has eight trucks sold in Utah. (R. 21; Tr. 64-65)

It was also brought out by Counsel for the General Counsel in his statement of the case, that Mr. Cooper told employee Ernest Barte, that if the union won the election Respondent would reduce his operation so that not more than five trucks would be kept running. (R. 19; Tr. 92)

Counsel for the General Counsel has also made reference to an alleged statement concerning a promise of remuneration in the event of the union's defeat. Mr. Ambrose categorically denies this (Tr. 104, 111). Counsel for the General Counsel has also made reference to alleged statements made by Mr. Cooper which constitute threats and coercion. These statements are not supported anywhere else, and were categorically denied by Mr. Ambrose. (Tr. 111)

DISCHARGES

The facts in this case with regard to the discharge of Richard Byrd are that he had a long record of unsatisfactory employment. The uncontradicted testimony of Mr. Ambrose shows that Byrd was not

a dependable employee. (Tr. p. 44, 111). In addition, the testimony shows that the only reason Mr. Byrd was hired at all was to pay off a debt previously owed the company (Tr. p. 111). The transcript also shows that sometime prior to Mr. Byrd's discharge, he was involved in an accident at a bridge somewhere in California. Testimony of Mr. Byrd discloses that according to company policy and rules this action was sufficient for a discharge. (Tr. 109). Subsequently, Mr. Byrd and another driver drove a truck and trailer to Butte, Montana. This trailer was then left at this destination and another trailer was picked up by the two drivers, and driven elsewhere. The owner, Mr. Ambrose, and some other men discovered that the front of the trailer had been damaged. (Tr. p. 108-109). Mr. Ambrose then confronted Mr. Byrd with this fact and accused him of causing the damage. (Tr. p. 109). At this point, the employee, Mr. Byrd, called Mr. Ambrose a "God damned liar." (Tr. p. 109). It was established that this act, in and of itself, independent of Mr. Byrd's guilt or innocence of the negligent and careless conduct, was sufficient to cause his discharge. (Tr. 109). It should also be noted that the transcript discloses that Mr. Byrd's own statement of the part he took in the disengaging of the truck from the trailer was negligent and careless. (Tr. p. 109).

With regard to the employee, Lawrence Smith, the record amply establishes that Smith was charged,

by unrefuted evidence, with the following:

- (1) He improperly used company money without consent; (Tr. 114)
- (2) He neglected making a written report on a chargeable accident which occurred in Canada, through his own negligence; (Tr. 112)
- (3) He made false statements with regard to his medical discharge from a hospital and the nature of his illness; (Tr. 123, 128, 129)
- (4) He took other work at a time when he was needed by the Respondent employer, thereby making himself unavailable, and, in effect, quitting his job with the Respondent. (Tr. 113, 114, 115)

ARGUMENT

I.

THE EVIDENCE ON THE RECORD DOES NOT SUPPORT THE BOARD'S FINDING THAT THE RESPONDENT VIOLATED SECTION 8(a) (1) OF THE ACT.

As previously stated, it is Counsel for the General Counsel's position that the statement by Mr. Ambrose "Now, whatever you fellows do don't vote for the union" constitutes a threat or reprisal. It is respectfully submitted that this is nothing more than an exercise of an employer's right to freedom of speech and to inform his employees that management or the employer are not in favor of labor organizations. *NLRB v. Corning Glass Works*, 204

Fed. 2d 422 (CA-1; 1953); *Mayfair Mid-West, Inc.* 148 NLRB 155 (1964). In the *Mayfair case*, supra, the Board held that the employer's statement that "We don't want the union here and we don't have one," was not coercive in effect. Mr. Ambrose's statement is nothing more than an exhortation to the employees to not vote for the union. This is nothing more than an exercise of the employer's right to freedom of speech.

Counsel for the General Counsel has taken the statement of Mr. Ambrose out of context from the transcript on pages 64 and 65 and has attempted to construe that as a threat. In this same colloquially it was stated that if there is a loss of the "Buttrey run" he has eight trucks sold in Utah. In order to clarify the import of M. Ambrose's statement the full context of what was said should be quoted.

"A. Is was the first part of February when we was working on this engine of the truck; Mr. Ambrose had asked me if I would like to work on the truck while it was in the shop, I told him sure.

"So I believe we started this work on a Monday; then Tuesday, about the middle of the afternoon Mr. Ambrose come in and I asked him how the runs were coming along; he said, 'Well, I'm agoin' to park the trucks for two weeks, startin' tomorrow, everything that comes in will set for two weeks.'

"I asked him what that was for and he said, 'It's for the benefit of the election;' he said, I want everybody to have an opportunity to vote.'

"I said, 'Well, my financial condition is going

to be pretty tough on me layin' around for two weeks;'

"He said, 'Well, if this causes me to lose my Buttrey run,' he says, 'I've got eight trucks sold in Utah,' and he said, 'If you'd like for me to I'll see if I can get you on one of those.' "

(Tr. p. 65, lines 1-18)

It is perfectly obvious from reading the full statement that the reason why the trucks would be shut down for the two week period would be to allow these employees to exercise their rights guaranteed by Section 7 of the National Labor Relations Act and have an opportunity to vote for or against the union. However, by side comment, it was also brought out by the transcript that the two week lay-over would necessitate the sale of eight trucks in Utah, but he would sell one of them to the employee in order to allay his financial condition occasioned by the two week shut-down. How this can be construed as a threat; as coercion; or as a reprisal is beyond comprehension.

In another portion of Counsel for the General Counsel's argument, it is brought out that Mr. Cooper told an employee, Ernest Bartee, that reduced operations would be occasioned in the event the union won the election (R. 19; Tr. 92). In *NLRB v. O'Keefe and Merritt Manufacturing Company*, 173 Fed. 2d 445 (CA-9; 1949), the Ninth Circuit held that a speech to employees that a CIO victory was regrettable in light of the fact that the

employer would have difficulty in selling household appliances to be installed by AFL electricians, was not coercive or constituting interference. In *Penn-Mor Manufacturing Corporation*, 136 NLRB 647 (1962), the Board also held that an employer did not violate Section 8(a)(1) where the President of the corporation made a speech after the union's defeat in an election, to the effect that it would be financially disastrous for the employer to be subjected to repetition of production losses which occurred during the organizational period. The statements of Mr. Cooper certainly do not constitute threats or coercion. They are merely statements of the economic condition of the company in relation to union activity.

The other statements allegedly made by Mr. Ambrose and Mr. Cooper which were referred to at great length in the Counsel for the General Counsel's Brief have been categorically denied by Mr. Ambrose.

II.

THE EVIDENCE ON THE RECORD DOES NOT SUPPORT THE BOARD'S FINDING THAT THE RESPONDENT VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT.

(a) Byrd's discharge.

The question before this Court with regard to the discharge of Mr. Byrd is whether or not the discharge was motivated because of Mr. Byrd's union

activity, or because of his misconduct as an employee. General Counsel has the burden of proving by the preponderance of the evidence that employer's conduct in discharging employees was motivated by anti-union considerations. *Radio Industries*, 101 NLRB 912 (1952); *Teetrad Company*, 125 NLRB No. 61 (1959), *Finnmore Corporation*, 131 NLRB (No. 84) (1961).

It is respectfully submitted that General Counsel has not carried this burden of proof. It has also been held that it is proper to discharge an employee because of negligence in operating machinery. *NLRB v. Burningham Publishing Company*, 262 Fed. 2d 2 (CA-5; 1959); *Dannen Grain and Milling Elevator Company v. NLRB*, 130 Fed. 2d 321 (CA-8; 1942).

In *Ferrell-Hicks Chevrolet, Inc.* 142 NLRB (No. 21) (1963), the Board held that disrespectful remarks to superiors was sufficient grounds for discharge of an employee.

The undisputed evidence in this case discloses that Mr. Byrd engaged in negligent, careless and improper conduct with regard to the use of trucks. (Tr. 108, 109). It is shown in the transcript that Mr. Byrd left or quit his job in the middle of a run with a load of merchandise on the truck. (Tr. 111) The record also discloses that when the employer questioned him concerning his use of the equipment Mr. Byrd chastized his superior with profanity and disrespectful remarks. (Tr. 109)

(b) Smith's discharge.

With the evidence in this record with regard to Mr. Smith's activities and the poor character of his work, it is difficult to believe that anything other than the caliber of his performance motivated his dismissal. The record as referred to on pages 4 and 5 of Respondent's statement of the case show that he improperly used company money, failed to make a written report of a chargeable accident which occurred through his negligence, and which increases the employer's insurance rates; made false statements with regard to his physical condition and intentionally sought other employment at a time when Respondent-employer needed his services, thereby making himself unavailable, and, in effect, quitting his job. There can be very little question but what any one of these grounds, taken alone, is sufficient for discharging an employee. However, Counsel for the General Counsel has taken the position in both instances, i.e. Byrd and Smith, that even though the actions of the employees were improper, the antipathy of the employer toward the union made the discharges illegal. In *NRLB v. Burningham Publishing Company*, 262 Fed. 2d 2 (CA-5, 1958), the Fifth Circuit Court of Appeals propounded the rule that if a man has given his employer just cause for his discharge the Board cannot save him from the consequences by showing that he was pro-union and his employer anti-union.

"We have no doubt that the Burningham Publishing Company was glad to get rid of Ed-

wards. But the Company has a right to operate its plant efficiently. If an employee is both inefficient and engaged in union activities, that is a coincidence that does not destroy the just cause for his discharge. We cannot say, and the evidence does not support the conclusion that the Board can say: 'Edwards was fired because the company's officials had an anti-union animus against Edwards.

"The evidence shows beyond a doubt that Edwards left his presses during working hours."

NLRB v. Burningham Publishing Company,
262 Fed. 2d (CA-5; 1959), at p. 9.

This rule was cited with approval and followed in *Frosty Morn Meats, Inc. v. NLRB*, 296 Fed. 2d 617 (5th Circuit; 1961); *NLRB v. Atlanta Coca-Cola Bottling Company*, 239 Fed. 2d 300 (5th Cir.; 1961); *Miller Electric and Manufacturing Company, Inc. v. NLRB*, 265 Fed. 2d 225 (7th Circuit; 1959). In the *Frosty Morn Meats, Inc.*, case, *supra*, the following was stated by the Fifth Circuit with regard to the application of the *Burningham* rule.

"When an employee gives his employer as much reason to fire him as Judkins did, by refusing to follow instructions and by giving not only his supervisor, but also his fellow employees the impression that he was uncooperative, there is no basis for the conclusion that the employer has treated him differently than he would have treated a non-union employee. As a speculative matter, it may or may not be true that union animus loomed larger in the employer's motivation than Judkins' short-comings as a worker.

When the evidence of just cause for discharge is as great as it is here, the record as a whole does not support the conclusion that the discharged employee was deprived of any right because of union activities. The power of reinstatement is remedial. It is not punitive. It is not to penalize an employer for anti-unionism by forcing on the payroll an employee unfit to stay on the job."

Frosty Morn Meats, Inc., v. NLRB,
296 Fed. 2d 617, at p. 621.

It is respectfully submitted that even though Mr. Ambrose and Mr. Cooper do harbor anti-union attitudes or animus, the record in this case is so replete with evidence of negligent and careless acts; hostility and insubordination toward the employer; failure to obey company rules to the detriment of the Respondent company; falsehoods with regard to physical condition; and improper use of company money, that their reason for discharge far outweighs any union animus existing in the mind of the employer. To require this employer to retain both of these employees after their record as employees makes the provisions of Section 8(a)(3) of the Act punitive, rather than remedial.

CONCLUSION

In conclusion the undisputed testimony in the transcript discloses that the statements made by the employer to his employees during the organizational period were, in fact, nothing more than statements

protected by freedom of speech principles. Authority in this area permits the employer to inform the union that he is not in favor of unionization in any of its forms.

Other statements relied upon by Counsel for the General Counsel disclose that they have been taken out of context and do not constitute threats or promises of benefits or coercion in any form.

The other statements allegedly made have been categorically denied by the persons allegedly making them.

With regards to the discharges, the testimony in this case amply shows that due to the extreme degree of poor workmanship and bad attitude of both of the employees, that the only consideration that could have motivated the Respondent in discharging them with their poor performance.

For the reasons stated, it is respectfully submitted that the Board's Order should not be enforced.

DATED: This day of September, 1965.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

ELI A. WESTON

Attorney for Respondent.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

72,108

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDEPENDENT STEVEDORE COMPANY
AND FIREMAN'S FUND INSURANCE COMPANY,

Appellants,

v.

J. J. O'LEARY, DEPUTY COMMISSIONER, BUREAU OF
EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE DEPUTY COMMISSIONER

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FILED

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FRANK H. STANFORD, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. ^{20,142}19,871

INDEPENDENT STEVEDORE COMPANY
AND FIREMAN'S FUND INSURANCE COMPANY,

Appellants,

v.

J. J. O'LEARY, DEPUTY COMMISSIONER, BUREAU OF
EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE DEPUTY COMMISSIONER

JURISDICTIONAL STATEMENT

This action was brought by appellants in the United States District Court for the District of Oregon, pursuant to Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 921(b), to review and set aside the Deputy Commissioner's Compensation award to the injured claimant.^{1/} On cross-motions for summary judgment, the district court, on

^{1/} The claimant was not made a party to this proceeding nor has he intervened in the same.

April 5, 1965, granted the Deputy Commissioner's motion and denied the motion filed by appellants, i.e., the claimant's employer and its insurance carrier (R. 59). On May 24, 1965, the appellants filed a notice of appeal in the district court (R. 61). The jurisdiction of this Court rests on 28 U.S.C. 1291.

STATEMENT OF THE CASE

On May 26, 1957, Dewey D. Brown sustained injuries to his lower back when, while working as a longshoreman aboard the cargo vessel MS "SUSA," a piece of timber rolled backwards in such a manner that his body received the full weight of the lumber (R. 16). At the time of his injury, and for some time prior thereto, Mr. Brown was in the employ of the Independent Stevedore Company of Coos Bay, Oregon (R. 20, 31).

On February 25, 1958, the longshoreman underwent an operation for "fusion of the lumbar vertebra with the sacrum" (R. 16, 45). His employer's insurance carrier paid him compensation in the amount of \$49.80 per week, for temporary total disability, from May 26, 1957 through July 5, 1960 (R. 16). On or about October 5, 1960, the insurance carrier paid Brown additional compensation in the amount of \$6,215.04, for permanent partial disability (R. 5, 16).

Thereafter, the longshoreman filed an application for review, in accordance with the provisions in Section 22 of the Act, 33 U.S.C. 922, on the ground that there had been a change

in his physical condition (R. 16). On February 5, 1964, a hearing was held before Deputy Commissioner J. J. O'Leary for the purpose of determining "whether Mr. Brown [was] permanently and totally disabled by reason of the injury he sustained on May 26, 1957" (R. 16-17). At the hearing, both the claimant and an orthopedic surgeon called on his behalf testified as to the nature and extent of his disability (R. 19-41). In addition, claimant submitted a medical report (R. 45-47) from Dr. John F. Abele, another orthopedic surgeon, which the Deputy Commissioner admitted into evidence (R. 43). No evidence was submitted by the employer or its insurance carrier (R. 43).

On April 1, 1964, the Deputy Commissioner issued an order awarding claimant additional compensation. He found, inter alia, that the back injury which claimant sustained while loading cargo aboard the MS "SUSA" had "necessitated a spinal fusion . . . on February 25, 1958 . . . [and] that as a result of that surgical operation on February 25, 1958, . . . the disability of the claimant . . . became permanent and total in character on July 6, 1960 . . . " (R. 7). The Deputy Commissioner concluded that the claimant was entitled to permanent total disability payments beginning on July 6, 1960, at the rate of \$49.80 per week, and continuing for the entire period of his disability (R. 7-8).^{2/}

On April 10, 1964, this action, seeking to set aside the compensation award, was instituted by claimant's employer and

2/ The employer and its insurance carrier received a credit for the \$6,215.04 already paid to claimant as permanent partial disability benefits.

its insurance carrier (R. 1-4). They asserted, in part, that the "injury of May 26, 1957, and [the] surgery of February 25, 1958, did not cause Dewey D. Brown to become permanently and totally disabled on July 6, 1960, or at any other time" (R. 3). Cross motions for summary judgment were then filed by the parties and on May 29, 1965, the district court entered judgment for the Deputy Commissioner (R. 59). The court stated that, after reviewing the record as a whole and allowing the Deputy Commissioner his reasonable inference, it was not convinced that the compensation order and award was unsupported by substantial evidence (R. 57-58).

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, et seq., provides in pertinent part:

33 U.S.C. 902. Definitions

When used in this chapter -- * * *

(2) The term "injury means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

* * * * *

33 U.S.C. 903(a):

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.* * *

33 U.S.C. 922:

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. * * *

ARGUMENT

THE DEPUTY COMMISSIONER'S FINDING THAT CLAIMANT'S DISABILITY RESULTED FROM AN INJURY SUSTAINED DURING THE COURSE OF HIS EMPLOYMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

- A. The Limited Scope of Review Under the Longshoremen's and Harbor Workers' Compensation Act

The rule applicable to judicial review of compensation orders, as pronounced by the Supreme Court in O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508-509 and O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 361-362, and by this Court in Morrison-Knudsen Co., Inc. v. O'Leary, 288 F. 2d 542, 543, Hastorf-Nettles, Inc., et al. v. Pillsbury, et al., 203 F. 2d 641, 643, and Crescent Wharf & Warehouse Co. v. Cyr, 200 F. 2d 633, 636, is that the Deputy Commissioner's findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.^{3/}

Similarly, judicial review of inferences drawn by the Deputy Commissioner is limited to a determination of whether those inferences are supported by substantial evidence and are not inconsistent with law. Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 477-478; see also Contractors PNAB v. Pillsbury, 150 F. 2d 310, 312 (C.A. 9); Liberty Mutual Insurance Co., v. Gray, 137 F. 2d 926, 928 (C.A. 9). In Cardillo, the Supreme Court stated that it is "[t]he Deputy Commissioner alone [who] is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court."

^{3/} "Substantial evidence" has been defined, of course, to mean "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229.

330 U.S. at 478. The only issue properly before the reviewing court in such a situation, is whether there is support for the Deputy Commissioner's conclusion. If there is, the reviewing court's "task is at an end." 330 U.S. at 479.

In the instant case, appellants concede that the claimant sustained a work-connected injury on May 26, 1957 (A. Br. 2). They also concede, as they must, that the record contains substantial evidence to support the Deputy Commissioner's finding that claimant is permanently and totally disabled within the meaning of the Longshoremen's Act (A. Br. 4).^{4/} What appellants challenge is the Deputy Commissioner's finding that claimant's disability is related to his May 26, 1957 injury (A. Br. 4-6). Thus, the sole question before this Court is whether there is substantial evidence in the record to support the Deputy Commissioner's causal relation finding. We submit that -- contrary to appellants' contention (A. Br. 4) -- the record does contain substantial evidence in support thereof.

B. The Record Supports the Deputy Commissioner's Causal Relation Finding.

The evidence before the Deputy Commissioner, at the time he rendered his decision, consisted of (1) the testimony of the claimant, Dewey D. Brown, (2) the testimony of an orthopedic

^{4/} The evidence in the record establishes conclusively that claimant is disabled (R. 20, 25, 29-30, 26-37, 40-41, 45-47).

surgeon, Dr. Winfred H. Clarke, and (3) the medical report of Dr. John F. Abele, another orthopedic surgeon. With respect to the question presently before the Court, the following evidence is significant:

Mr. Brown testified that he injured his back in 1957, while working as longshoreman for the appellant Independent Stevedoring Company (R. 32). Subsequently, claimant stated, he underwent an operation and, several months thereafter, began taking "heat treatments" for his back in Coos Bay, Oregon (R. 32-33). According to Mr. Brown, Dr. Quinn, the physician who administered the "heat treatments," told him that his back condition "was getting worse all the time" (R. 33). Dr. Quinn informed him, after three or four months of treatment, that he would never be able to engage in the activities of longshoreman again (R. 33).

Shortly before filing his application for review, claimant "woke up in the middle of the night . . . [experiencing] awful pain" (R. 33-34). Mr. Brown testified that he "couldn't move" (R. 34). He was taken by ambulance to a hospital in Salem, Oregon, where claimant requested the attending physicians to operate on him in order to relieve the pain (R. 34-35). Claimant stated that they refused to do so (R. 34-35).

Mr. Brown testified that, due to his back condition, he is unable to ride in a car, sit for any length of time or sleep for more than a two hour period (R. 36). He stated that he attempted to paint his picket fence one day, but had to quit

After twenty minutes because his back "hurt terrible" (R. 35). Claimant cannot do any lifting and he cannot even "bend over to pick up a penny" (R. 40). He takes "up to twenty to thirty aspirin a day along with [his pain pills]" (R. 40). Since the date of his injury (May 26, 1957), claimant has not done "any work] at all" (R. 41).

Dr. Clarke testified that Mr. Brown had injured his back in 1957, and that, sometime prior to the date (October 13, 1959) when he first examined claimant, a low back fusion had been performed on him (R. 21-22). The orthopedic surgeon stated that his October 13, 1959 examination of claimant disclosed certain degrees of motion . . . present in his back above . . . the areas . . . that were involved in the fusion" (R. 23). However, Dr. Clarke testified, when he examined Mr. Brown a second time "in July of 1963, he [found] essentially no motion" in the upper part of the back (R. 23). Dr. Clarke stated that the spinal fusion . . . had placed an "extra load . . . on the other part of [claimant's] back" (R. 25). On the basis of his July 1963 findings, Dr. Clarke expressed the opinion that "the contributing part of [claimant's] back problem . . . was his back fusion" (R. 20). In the orthopedist's view, Brown was

"totally disabled from doing any gainful occupation" (R. 20).^{2/}

The only other evidence before the Deputy Commissioner was a medical report dated August 21, 1962 (R. 43). In that report, Dr. John F. Abele, another orthopedic surgeon, noted that claimant had injured his back "while working as a longshoreman," and that, after his "back problems continued, . . . he . . . submitted . . . to a spinal fusion of the lumbar vertebra with the sacrum" (R. 45). The operation was performed by Dr. Donald Slocum of Eugene, Oregon. Dr. Abele stated that his examination of claimant, on November 28, 1961, led him to believe that Mr. Brown's physical condition was such that he "would be very much surprised if this man could be rehabilitated enough to be employed in a gainful activity" (R. 47).

In sum, the evidence establishes that claimant underwent a spinal fusion in 1958, in order to alleviate some of the "back problems" which had arisen by virtue of an earlier work-connected injury (R. 21-22, 45), but that the fusion, instead, resulted in his becoming unable to engage in any gainful occupation (R. 20, 25). The Deputy Commissioner was clearly justified, in light

5/ Dr. Clarke was apparently of the view that, while claimant's back condition rendered him only 40 per cent disabled, from a physical standpoint, it rendered him 100 per cent disabled, as far as his capacity for work was concerned. We note, in this regard, that the courts have consistently stated that, in determining whether a claimant is "disabled" within the meaning of the Longshoremen's Act, the Deputy Commissioner's must look to the claimant's age, education, work experience and job capabilities, as well as his physical condition. See Cunyngham v. Donovan, 328 F. 2d 694 (C.A. 5); McGrath v. Hughes, 289 F. 2d 403 (C.A. 2); Eastern S.S. Lines v. Monahan, 110 F. 2d 840 (C.A. 1).

of this evidence, in finding (R. 7) that the May 26, 1957 "accidental injury . . . necessitated a spinal fusion . . . on February 25, 1958 . . . [and] that as a result of the surgical operation . . . [claimant's] disability . . . became permanent and total in character on July 6, 1960 . . . "

At the very least, the record permitted the Deputy Commissioner, to infer that the May 26, 1957 injury resulted in claimant's disability. See Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 478-479; Crescent Wharf & Warehouse Co. v. City of New York, 200 F. 2d 633, 636 (C.A. 9). For, it contained evidence showing that claimant had to undergo a spinal fusion because of an injury sustained during the course of his employment (R. 32-33, 45) and that he became disabled, subsequently, due to the fusion of his lower back (R. 20, 25).

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed.

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AUGUST 1965

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Lawrence R. Schneider
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UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT NO. 1 OF PEND
OREILLE COUNTY, *Appellant*,

vs.

CITY OF SEATTLE, *Appellee*.

CITY OF SEATTLE, *Appellant*,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF PEND
OREILLE COUNTY, *Appellee*.

*On Appeal from the Judgment of the
United States District Court for the Eastern District
of Washington*

APPENDIX TO

BRIEF OF APPELLANT-APPELLEE

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APPENDIX**MEMORANDUM OF INTENT****In Connection with
POWER DEVELOPMENT ON THE PEND OREILLE RIVER**

August 25, 1954

At a meeting today with representatives of PUBLIC UTILITY DISTRICT NO. 1 of PEND OREILLE COUNTY (hereinafter referred to as the "DISTRICT"), and representatives of CITY OF SEATTLE DEPARTMENT OF LIGHTING (hereinafter referred to as the "CITY"), the following suggestions for a proposed agreement between the District and the City were proposed as the basis of an eventual settlement in recognition of the interests of both parties in the construction and development of power in the Z Canyon area of the Pend Oreille River. The suggestions of course are only an attempt to arrive at some basic principles of agreement which would have to be submitted to and approved by the respective authorities of the two agencies.

1. The District owns certain lands and rights in the Z Canyon area, and has definite plans for the development of a dam and power facilities at the Z Canyon site.

2. The City has applied to the Federal Power Commission for a preliminary permit to conduct investigations leading to the development of a dam and powerhouse in the Z Canyon area, the

permit application being designated as the **"BOUNDARY"** permit.

3. The District has filed an intervention with the Federal Power Commission opposing the application of the City for a preliminary permit.

4. The Pend Oreille Mines and Metals Co. has filed an intervention with the Federal Power Commission opposing the application of the City for a preliminary permit.

5. The Department of Interior in filing its report to the Federal Power Commission on the City's application for this preliminary permit has stated that because of the possible damage by the construction of a dam at the Boundary Site to the mining interests in that area that the construction of a dam at this site should be indefinitely postponed.

6. It is the desire of the parties to develop a plan which will protect the interests and facilities of all parties concerned, and result in the building of this much needed low-cost power project.

7. In view of these facts and of the desirability of finding a solution to the problems of this power project which will be satisfactory to the City and the District and will recognize their rights, and will be satisfactory to the mining interests, and will provide both the City and the District with an additional source of low-cost power, it is agreed that the City and the District should attempt to work out a solution to these problems together.

As a basic principle for arriving at a solution of the equitable arrangements or agreements to be entered into between the District and the City, it is suggested that one of the parties should accept the responsibility of building, financing, owning and operating the facilities necessary to store and control water, and the other party should accept the responsibility of building, financing, owning and operating the facilities necessary to convert that water into electricity, and that this division or responsibility should be as nearly as is physically appropriate in the development of these two functions on a 50-50 basis so that each would have as a result of its financial contribution approximately 50 percent of the power from the project in perpetuity. By this arrangement it is felt that each of the parties would be carrying out its basic responsibilities to the people that it serves.

Some mutually agreeable arrangement between the District and the City compatible with the financing requirements of the District will be worked out for the sale of power surplus to the needs of the District.

Direct Examination of the Witness, John L. Vaughan, Except with Reference to his Qualifications, and Pertinent Portions of his Cross Examination.

DIRECT EXAMINATION

* * *

By Mr. ENNIS:

Q. Mr. Vaughan, have you made an appraisal of land and land rights owned by the Public Utility District of Pend Oreille County?

A. Yes, sir.

Q. Along the Pend Oreille River?

A. Yes, sir, I have.

Q. Would you describe the property and rights that you appraised?

A. May I go to the blackboard to point it out?

Q. Yes.

A. The property appraised consists of various parts. The one fee title to uplands is designated in blue on the map, of which of that portion shown on the map, it is my understanding that only a part is being taken by the action. According to planimetering measurements, the total area prior to the taking was 191.47 acres, and of that, 81.73 acres is being taken and is included in the appraisal.

As shown on the map in red, fee titles to shore lands, running from a point approximately one mile south of the Canadian border up to approximately the location of the Z Canyon site, and overlapping the perpetual easements on the shore lands in the Box

Canyon area, and then the perpetual easements for overflow from there clear up the river to a point in the vicinity of Box Canyon dam.

Q. I believe, Mr. Vaughan, when you started to talk about the flowage rights in the overlap area, I think you mentioned Box Canyon area. Did you mean Box Canyon area at that time?

A. I'm sorry, Z Canyon area.

Q. Mr. Vaughan, what was the purpose of your appraisal, as you understood it?

A. The purpose of my appraisal was to arrive at an opinion as to the fair market value of all of these rights as of the current date.

Q. Would you give us your definition of "fair market value?"

A. "fair market value" is the highest price, in terms of money, which could be realized for the property if offered for sale on the open market, both buyer and seller having full knowledge of all of the uses to which the property could be put, with the buyer under no compulsion to buy and the seller under no compulsion to sell.

Q. What is the first step that you follow in making such an appraisal?

A. Well, the first step is to inspect the property and find out what it is you are appraising. The second step is to arrive at an opinion as to the highest and best use of the property. The determination of highest and best use would, of course, dictate, or at least in-

dicate, the appraisal approaches or procedures which should be followed in making the appraisal.

Q. Did you make an inspection of this property?

A. Yes, I did.

Q. And —

A. I have made several inspections of the property.

Q. In what period of time were these inspections?

A. Well, the first inspection was made before any work was done on the appraisal itself, the latter part of June, to the best of my recollection, it was June 30th, in which we drove down the Pend Oreille River, inspected the Box Canyon dam, generally observed the river from Box Canyon down to Z Canyon, walked down into the Z Canyon site and looked over the terrain and topography of the Z Canyon site, and then inspected the Boundary dam and the status of construction at that date.

Subsequent to that time, I have made other inspections of the river from the Boundary dam site area up as far as above Noxon Rapids on the Clark Fork.

Q. Did you make a determination of highest and best use in this case, in your opinion?

A. Yes, sir, I did.

Q. And what did you determine in that regard?

A. Well, maybe I could explain how, what I did, to arrive at that.

Q. Yes, would you do that?

A. Well, first, I had prints made available to me of engineering studies and drilling that had been done in the Z Canyon site way back in the early years, I

don't recall the exact date. I was advised that the measuring station on the river bank was put in back as far as 1928. Over a period of time, numerous studies and plans were made leading to and planning for the development of a hydroelectric plant installation, and as a part of the acquisition of the property by the present owners, all of the studies, engineering plans, and other data which had been prepared by the previous owner were acquired as a part of the property rights of the PUD.

In addition, there has been testimony by qualified experts in this case as to stream flow studies, feasibility studies, and engineering feasibility and other factors, which lead me to the conclusion that there can be no question that the highest and best use of the site is for a hydroelectric installation.

Q. Did you then make that conclusion in your own mind?

A. Yes, I did.

Q. After arriving at your opinion of the highest and best use, Mr. Vaughan, what did you next consider?

A. I next gave consideration to the best appraisal procedure that should be followed in evaluating these rights, and I might mention at this point, after coming to the conclusion that the highest and best use of the property was for a dam site, it assumed a different identity.

I had talked about the shore lands, the fee title, the uplands, the fee title, and the other component parts of the property owned, and in my opinion, all of these

component parts, after being assembled into the makings of the hydroelectric plant site, then become what is sometimes called a "bundle of rights" and it is the highest and best use of the bundle of rights, not one acre in it that I am considering in this appraisal.

Since it is necessary to appraise the right to build the hydroelectric dam, which is created by these rights, there are several approaches which can be considered.

Of the conventional appraising practices, there are three basic approaches to value, the reproduction cost new, the market or comparable data approach, or the capitalization of income or economic approach. Those are the methods.

On the reproduction cost approach which is normally applied to man-made properties which can be rebuilt or reproduced, that possibility did not exist in this case.

However, there is a sub-branch of this, sometimes called the "theory of substitution" in which the cost of substituting an alternate property of equal value can be used to measure the value of the property taken.

So, I first investigated the possibility of substituting an equally desirable property right for the property right to be taken, and the studies I made in the past and those made by others which I reviewed currently lead me to the conclusion that there is no available, equally desirable hydroelectric plant site in the general area.

Another possible substitution, since the purpose of the hydroelectric plant is to produce electrical energy would be the theoretical possibility of substituting

a thermal generation plant, which is dependent on heat for the production of electrical energy.

Thermo generation plants use various types of fuel, including gas, coal, oil, and nuclear energy. Nuclear energy seems to be pretty much speculative in its present stage at the moment, and there must be a great deal more experimentation before such energy can be produced at a cost which would be competitive with that at a good hydroelectric installation.

In the studies I have made in the East of mine-mouth thermo plants, they are approaching the cost of energy produced by hydroelectric plants however there is no such source of fuel available in the general vicinity here, and the cost of transporting oil or gas to this location led me to the conclusion that there is very little possibility in the foreseeable future of a substitute for this hydroelectric plant in the form of any thermo plant in this general area to produce power which would be competitive with the hydro plant.

So, since we cannot use the reproduction cost approach, we next consider the market data approach, conventional market data or comparable sales, and you go into the area and find out what comparable acres have sold for and apply it as a measure of value.

I can find no instance in which a bundle of rights, completely assembled, giving the person the advantage of the permanent location, the permanent stream flow, and 99 percent of the rights necessary to build the dam are sold in one lump sum.

I did not consider that the price paid for land on an acreage basis has any relation to the valuation of these rights as a hydroelectric plant site.

So, we cannot use the comparable sales approach as such. However, there is an element of comparable data which I did use; the purpose of building a hydroelectric installation or any electrical installation is only the output of power, and the output of power is normally measured in net generation or in kilowatt hours per year.

So, I adopted that as a basis of comparison, as a primary basis of comparison, and I used the readily available statistical sources, principally the Federal Power Commission bulletins.

I was able to draw an investment comparison, from an investment standpoint, as a function of the net generation output of a hydroelectric installation in the area.

I made a further comparison on a broader scale, with the investment in hydroelectric facility as a function of the name plate capacity, again using Federal Power Commission data as a basis.

These were the primary factors used in arriving at my conclusions with respect to value.

Q. I think you mentioned a third method?

A. The economic or the income approach, used in valuing businessess. I think a hydroelectric installation cannot be considered generally as a profit making enterprise. Certainly there are many public utilities owned by private investors for the purpose of making

a reasonable profit, but as clearly demonstrated by the fact that they are subject to regulation, the primary purpose of them is a public service, to deliver power to the users at the lowest feasible cost, an economically sound cost.

In view of this fact I did not think it would be proper to use any form of the income approach in evaluating these rights.

The cost of the facilities necessary to generate a given amount of power are substantial, and the factors determining the values of the dam site property are briefly summarized in four categories.

First, what it would cost to build the hydroelectric dam; secondly, after it was built, what would it produce, how many units of power would be available; what it would produce it for, how much it would cost to produce it; is there a market demand for it that could be satisfied at a rate which would be economically feasible.

All of these factors have to be considered, and I have considered them in my analysis, and as far as the general economic feasibility is concerned, to me that is beyond question.

* * *

I was attempting to explain the general procedure used, and the general practices considered, rather than giving any conclusions at this time.

In considering the economic feasibility of erecting a dam site, there are general factors which must be considered, and specific factors.

The general factors would include, is there a need for a hydroelectric project, additional hydroelectric power in the area?

I don't think it takes a qualified economist to read the Wall Street Journal and see that 20 companies in the New Mexico-Arizona-California area are getting together in a group to coordinate their expenditures and efforts to develop additional power because of the critical need for this power.

I was able to review studies made by bona fide economists in connection with bond issues of proposed projects in the general vicinity, and to review their conclusions as to the need for power and the economic feasibility of building such projects.

I reviewed all these data in general terms as to the overall need, and I reviewed the cost estimates prepared by the Harza Engineering Company, giving the direct costs and construction costs of building a high or low project, and I reviewed the testimony presented by a representative of the Beck Company, which deal with a study of net generation and economic feasibility and production costs.

I have utilized all of this information in arriving at my conclusion as to the value.

By Mr. ENNIS:

Q. What factors in your opinion would be considered or should be considered by an informed purchaser in arriving at an opinion of value of the properties.

A. I think any value of the properties, I think any informed buyer or investor in connection with an in-

vestment of this magnitude would give careful consideration to all of these factors.

Q. Did you consider what effect, if any, these factors that you have discussed, the availability of the property for the use that you have mentioned would have upon a willing buyer?

A. Yes, sir.

Q. Did you consider what effect these factors that you have discussed, the availability of the property for use that you have discussed, would have on the fair market value of the property under present conditions?

A. Yes, sir.

Q. After giving consideration to all of these factors, did you arrive at an opinion of fair market value, as you have defined that term?

A. Yes, I did.

Q. What value did you arrive at?

Mr. HELSELL: We object to this question being asked of this witness, we object to this witness being asked to express his conclusion as to value on several grounds.

He has now outlined for us the basis upon which he arrived at his opinion. He has outlined his qualifications. It does not appear so far that he has any familiarity with the going prices in that area for this so-called "bundle of rights" that he is evaluating. He was asked if he used that approach, and he says that he has not used it.

He has told us that he used some comparisons from studies from the Federal Power Commission, of other

damsite acquisitions, presumably in other parts of the country.

If I have gathered from his statement that he is simply using figures that are shown on these statistics as to how much certain project properties, with certain kilowatt hours in production have paid, in their cases for land and land rights.

Or, he tells us he has used an alternative approach of name-plate rating, and then taken statistic as to how much proprietors of comparable plants, by name-plate rating, have paid for their land and land rights.

On the face of it, it is a highly improper basis to arrive at value, because as your Honor can see, in these statistics, or lands, there are lands everywhere in the United States. Figures involving what condemnors, public agencies, have paid for property as the result of jury verdicts or as the result of negotiations under the threat of condemnation, and various statistics therefor, that the witness says that he has used those statistics are not sufficient as a matter of law to support an opinion on that subject.

Lastly, he told us that he considered the economic approach, to the extent that he considered market, and so forth, cost of producing power based on the cost of construction of the project, and those matters but I do not understand that he is using the income approach to value, and if he weren't of course we would object on the same grounds as raised previously in this proceedings.

In summary, therefor, we object to this witness expressing an opinion on the basis which he has thus far indicated that he used in arriving at his conclusion, and on the basis, demonstrably as he has described it, it does not provide a sufficient basis for him to express a legal opinion on this subject.

The COURT: You do not attack the man's qualifications?

Mr. HELSELL: In the sense that I mentioned, your Honor, that the man has not indicated that he has ever appraised, as such, this bundle of rights, involving several tracts of land for damsite purposes, it may be that he has, but simply didn't say so, but we attack his qualifications, because of the complete absence of any showing that he has ever undertaken any study like this one, with raw lands which he has considered as a dam site, and on which he has placed a valuation.

Mr. ENNIS: I think the qualifications of this witness show beyond any question of a doubt the wide range of the experience that he has had, his experience in and having outlined the factors that he took into consideration, factors that are always recognized as proper to be taken into consideration by an expert witness, it established that he has a basis for expressing his opinion as an expert witness as to the fair market value that he has been discussing.

The COURT: Don't you think he should explain the basis on which he makes his evaluation?

Mr. ENNIS: I intend to go into that in detail, your Honor, as to how he reached his evaluation that he has

described, the matters and things that he took into consideration in arriving at his view.

The COURT: It is my understanding that he is using the market value approach, but without any comparable sales, because he found none, that it was just a bundle of rights being sold. That is my understanding.

Mr. ENNIS: That is my understanding.

The COURT: It is a market value approach isn't it?

Mr. ENNIS: It is an offshoot of the market value approach, I suppose.

The COURT: Not using any comparable sales or comparable data. I will let him answer. The objection is overruled.

Mr. HELSELL: Just one further objection, your Honor.

Here we have a witness, your Honor, that is basing his value on a portion of an overall tract taken. He has given us no indication that he has considered the overall tract before the taking or after the taking, or the value of the remainder.

I submit, your Honor, that on the same basis that Mr. Oberbillig's views are not admissible because of his failure to use that approach, so should the views of this witness be objectionable, on the same ground. It is a method of just testing, without actually using the lands involved, and using the approach that must be used legally.

Mr. ENNIS: He is appraising everything that they took.

The COURT: Aren't they taking just a portion of the uplands, that is the only additional objection that Mr. Helsell has made.

By Mr. ENNIS:

Q. I will ask you, Mr. Vaughan, would your opinion of value be any different, if you consider, with reference to the uplands, if you consider the entire 191 acres as distinguished from the 81 acres?

A. I did consider that, sir, and I will so state in my testimony, and that is the reason I designated what was involved, what was the part taken, what was the part remaining. I considered that, sir.

The COURT: I will let him answer.

The WITNESS: I will have to give it in two parts, because of the high and low dam considerations, and explain a parallel which might explain why this is necessary.

If it is considered that an apartment house site, if the highest and best use indicated that it should be a three story apartment house, the underlying land would have one value; if, on the other hand the highest and best use indicated a 25 story apartment house, the value of the land would be considerably greater.

We have the situation here that there is a question as to whether or not the highest and best use of this site, permitted use, would be for the so-called high dam or low dam.

The high dam would certainly appear to be the highest and best use, provided such construction is permitted, but since I am not qualified to express an

opinion as to the legal permissibility, I will have to give my answer on both, assuming that a high dam could be built, and assuming that a low dam could be built.

MR. HELSELL: Before the witness does that, your Honor, in view of this additional development, may I object to this approach, because it is up to this witness, as I understand the law with reference to this kind of an expert witness, to arrive at the highest and best use for land, real estate, and then to arrive at a value for that real estate, so that, in abdicating that function, by saying, "I don't know which is the best use," I submit he completely departs from providing us with the necessary basis for the expression of his views.

MR. ENNIS: He intends to express both views, your Honor.

THE COURT: Mr. Ennis, I am inclined to think that objection may be well taken.

You are valuing the land. You are valuing the land and land rights, so what difference does it make whether somebody might decide, if they bought it, that they would put a high or a low dam on it. I suppose the fellow who bought it, if you could find such a fellow, would be able to decide that himself after he bought the property.

MR. ENNIS: Well, let's make it this way, your Honor:
By MR. ENNIS:

Q. I will give it to you this way, Mr. Vaughan, what value did you arrive at, in considering the highest and best use?

A. In my opinion the highest and best use was for the high dam, and I have an opinion for the highest and best basis.

Q. Would you express that opinion?

Mr. HELSELL: We have a continuing objection to this line of questioning as I understand it.

The COURT: Yes.

The WITNESS: In my opinion, the fair market value of the entire property before the taking, is \$8,702,200.

The fair market value of the property remaining after the taking is \$2,200, so the value of the property taken, is \$8,700,000.

By Mr. ENNIS:

Q. Mr. Vaughan, will you now explain to the Court the basis for your conclusions?

A. Well, I have given in general terms of the type of studies that I made, and I won't repeat that, the general economic investigation which I think is self-evident; the two somewhat detailed statistical studies that I made, using the Federal Power Commission report as a basis; I took the four dams for hydroelectric installations which are on the Pend Oreille River and the Clark Fork, above the subject property, mainly the Box Canyon, Albeni Falls, Cabinet Gorge, and Noxon Rapids Installations.

From the data available in the FPC bulletin, I computed the investment in each of these projects as a function of the net generation, designed net generation.

From this summary and comparison, I found the average investment in land, upriver, as a function of that generation, both in land and in total assets necessary to produce the given amount of electricity.

Using the estimate prepared by Harza, and by Beck on the total investment required in assets other than land, I made a comparison which permitted me to draw a comparative value estimate of the land and land rights of the Z Canyon site, assuming the project were completed at the estimated cost, and were in operation, and was producing power at the annual rate projected.

Obviously, that could not be used directly as a measure of value of the land in the present condition, anybody buying it in its present condition would be buying it for the purpose of creating this value. Obviously, he would not pay that amount for it.

I computed the relationship, again putting everything on a kilowatt hour basis, and the relationship between the cost of kilowatt hour of the other dams, for things other than land and land rights, as compared to the projected costs per kilowatt hour of the construction components of the Z Canyon site.

Applying this ratio, of course, to the land costs of upstream projects, I arrived at an estimated ratio of land values to the other costs.

It would take at least four years from the time the purchaser acquired this, to go through the procedure of getting permits and drawing plans and getting it built.

It may take considerably longer than four years, so I have applied a discount factor to reduce that value from the indicated value subsequent to completion, to get an indication of the justified value of the rights in their present condition.

My estimate of \$8,700,000 is based on that consideration.

However, there is another factor which must be considered, and that is that these rights, owned by the PUD do not constitute the entire rights necessary. There has been a question — well, the prospective purchaser would recognize the fact that it would be necessary to acquire the overflow rights on some land, some mining claims, and there is a possibility as shown on the map, of some other small areas of property being acquired.

So, I have made a judgment allowance of \$100,000 for the possible cost of acquiring these additional rights, and I have reduced my estimate of value from \$8,700,000 to \$8,600,000.

The value of the small parcel of upland lands remaining before and after would be unchanged. I merely added that before and after to express an opinion as to the overall valuation.

Q. Now, Mr. Vaughan, you mentioned this matter of economic justification. What do you mean by that?

A. Well, there are two checks that I have made on this initial computation, sir.

The first check, and I mentioned the name-plate data, are tabulated 10 projects which have been built

in the general geographic area in the period subsequent to 1951, all of them being jobs of some considerable magnitude, ranging from the name-plate capacity minimum of 95 megawatts to a maximum of 1,125 maximum megawatts, and I have made a comparison of these projects on two basis, first on the investment of land originally, original costs, and the investment in the other assets at the original costs as a function of cost per name-plate kilowatt capacity, and I have also made a comparison trending the costs up, construction costs up.

I have also made a comparison trending the costs up, construction costs up, from the date of construction to the current date to get an estimate of what the over-all investment would be, assuming that they were built under today's conditions.

After analyzing these, individually and collectively, I find that if the prospective purchaser acquired the Z Canyon site at my appraised value, the total investment would still be substantially less than that of any other project considered.

Mr. HELSELL: We will move to strike that, your Honor, on the exact same grounds as we moved to strike a similar comparison by Mr. Stenson, as to costs of other sites as justifying his appraisal of this site.

We move to strike the phrase as to what the witness found from this comparison and everything that came afterward.

Mr. ENNIS: This witness is an expert witness who has expressed an opinion of value.

The COURT: May we have it read back?

(Latter portion of answer read)

Mr. ENNIS: As I stated, the witness has given the basis of his opinion as to value. The authorities hold, in such cases, that expert opinions may be given by qualified witnesses and that they should be permitted to explain their reasoning by which they arrive at their opinion.

The COURT: All right, let me ask Mr. Helsell what the ground of his motion to strike is?

Mr. HELSELL: The ground is this, your Honor: The witness is, in essence, telling us — and I am sure he will concede this — that here is what a purchaser could pay for lands to build a dam at the Z Canyon site. First, he says, “I base my opinion on what others have paid, and I go from that to say that a purchaser could safely pay X dollars at this site because others have paid Y dollars at other sites.”

Now, we say this is a completely inappropriate approach to fair market value at a particular site, and if I may use an analogy, if we were appraising a home here and we had some F.H.A. statistics as to what people in certain income groups pay for their houses, would that be admissible as evidence of the value of a particular house under condemnation? No. And I submit the analogy is perfect, your Honor.

This witness just says: “Here is what others have paid. Based on that, I find that a purchaser here

could pay this and not get hurt financially." Basically, that is what he says. And I submit that that is an entirely improper approach to appraisal and one which counsel can find no support for in the cases.

It is pure speculation, and on that basis, we certainly object to it.

Mr. ENNIS: Counsel's reference is to a house and not to land suitable for production of power. My recollection is the witness has testified that he is testifying now as to the matters that a buyer, in his opinion, would take into consideration in arriving at the value that he would pay, or that he could pay, and I think that is —

The COURT: What right has he got to testify as to what he could pay? Why is that material in this case, counsel?

Mr. ENNIS: What he would pay.

The COURT: No, we are talking about fair market value on the open market for cash between a buyer and seller, neither under compulsion, and we are talking about raw land, really raw land, and here he builds a power plant and says the ratio is such and such.

I am concerned about the validity of this testimony.

Mr. ENNIS: I might ask the witness this question

Q. In your opinion, Mr. Vaughan, would this matter that you have just discussed be a factor that would be considered by a buyer and seller in arriving at fair market value for the property as it now exists?

A. Yes, I think it would be necessary, for the reason that you cannot apply, in my opinion, the conventional appraisal procedures, because there is no measure, no comparable measure, of what people have in the past paid for equivalent rights.

These rights are unique, in my experience. They are not just raw land; they include the engineering plans, the years of planning for building the site. These are wrapped up in a bundle and they are unique and, in my appraisal experience, you cannot go to the market.

The comparison that counsel has used would be invalid, because it is certainly no problem for the appraiser to go to the market and find out what houses are selling for.

The COURT: May I ask, Mr. Ennis, if this witness' views also appraise the engineering reports and plans that were made for developing this property? I don't think those are being taken.

Mr. ENNIS: I don't believe so.

The COURT: That is what he said.

Mr. ENNIS: My understanding of his testimony in that regard was that he considered that in arriving at the highest and best use.

The COURT: I don't believe he said that. Would you mind reading the answer?

(Answer read)

Mr. HELSELL: I think, in any case, he has used in his bundle of rights some engineering plans.

The COURT: I will grant the motion to strike that

portion of his answer that was moved against previously.

Mr. ENNIS: And how far back did that go?

The COURT: When he said, after analyzing all the other projects, he finds that his appraisal is substantially less than land and land rights in other projects. I think that is substantially what the statement was.

Q. (By Mr. Ennis) Mr. Vaughan, in reaching your appraisal, did you consider as a part of the property being taken any engineering plans or anything like that?

Answer. No, sir, I did not. Only the knowledge which was a matter of common knowledge which had been disseminated and gained as a result of these engineering studies which had been made.

All of this would lead, would aid, the purchaser in arriving at his conclusion that this is the highest and best use, was for a dam site.

Q. What factors did you take into consideration in determining the economic feasibility of this project?

A. Well, I have said before, the only reason that anybody, public agency or private agency, would build a generating station is to produce power in the form of electrical energy for the use of the public. And one of the studies I made was, assuming that this project were built at the estimated value, assuming that the land and land rights were acquired at my appraised value, what would be the cost of generation and would the cost producing the net kilowatt-hour energy be at

a level which would be economically feasible in relation to the costs of other plants in the general area.

Q. And what, in your opinion, would purchasers of this type of property that is being condemned, what study would they make in that regard?

A. I certainly think that anybody interested in making a major investment to produce a product would want to know whether the product would sell at a higher or lower cost than the competition, so in this instance, where the public would benefit through getting power at a lower cost than they had been able to get it from other plants —

Mr. HELSELL: Just a moment.

We will move to strike that last phrase as an expression of opinion by this witness as to the costs of power and the benefits to the public from getting power from this plant. I know of no basis —

The COURT: I thought he said they would investigate.

Mr. HELSELL: If it was clearly, simply that they they would investigate it, then I would withdraw my objection.

Mr. E NNIS: That is what I asked him, if they would investigate it.

Q. In making such an investigation, did you make such an investigation?

A. Yes, sir.

Q. And what did you find as a result of that investigation?

Mr. HELSELL: We will object if the question is designed to ask for his opinion as to the economic feas-

ibility of this project on the grounds stated a moment ago.

We don't believe that this witness, your Honor, by his very description of the matters he considered and by his description of his qualifications, may express his opinion here as to the economic feasibility of the project. Included in his figures, for example, is what he calls a judgment figure for the costs of land rights that a person would have to acquire that aren't already owned. The record supplies no support and this witness has supplied no support for that kind of a figure.

Beyond that, we are getting again into this question of market for power, could the power from this plant be sold in this market, obviously an issue of economic feasibility.

And we submit again, No. 1, this witness is not qualified to express an opinion on that, and, No. 2, that is an area which we believe is an impermissible excursion in this case in valuing the value of raw land.

Mr. ENNIS: Cost estimates have been permitted in cases, expert witnesses are permitted to make estimates of economic feasibility. It is one of the factors that they are permitted to take into consideration in reaching fair market value, and he has testified that he did, that he considered that, and now we desire to have him testify as to what his investigation revealed in that category.

Expert witnesses are always permitted to give the

bases for their opinion upon which it is based. That is what he is attempting to do.

The COURT: I will let him answer.

A. I found, as a result of this study and the cost estimates made available to me, that the cost of power at this station, again assuming these factors, that it could be built at the estimated cost and if the lands were purchased at my appraised value, then the power could be produced at a cost substantially less than that of other plants in the area.

Mr. HELSELL: To preserve our record, may we move to strike that answer on all the grounds stated in the objection, your Honor?

The COURT: Yes. Motion denied.

* * *

Q. Mr. Vaughan, have you, in your experience, been called upon at any time to appraise land and land rights in connection with a hydroelectric project?

A. Yes, I have.

Q. When was that?

A. That was last year, on two projects that I mentioned, one of them was the Virginia Electric Power System on the Roanoke River, and another in Gaston, North Carolina and there I expressed an opinion as to the fair market value of land and land rights necessary.

In order to be clear, that was land and land rights of an existing hydro installation.

Mr. ENNIS: You may cross-examine.

CROSS EXAMINATION

By Mr. HELSELL:

* * *

Q. Well, now, when you talk about a right to build a dam, I am curious about that. What right did you assume that the Public Utility District of Pend Oreille County had to build a dam at Z Canyon in arriving at your \$8,000,000 figure?

A. They owned the land upon which the dam would be built, the adjacent — they had the flow rights, the overflow rights, sufficient to cover the reservoir, to private lands and adjoining the federal land which would permit the rest of it, there was a need for the dam in that location.

There is no inherent right for anybody to build a dam; you have to get permits from the federal agencies; but I think it is reasonable to assume that if anyone owned these rights under these circumstances, when there was a need for additional power, that the regulatory bodies would not be capricious or would not refuse to grant the permit to a bona fide owner who was capable of utilizing the property.

Q. As I understand your testimony, the complete bundle of rights is not now, in your judgment, owned by the PUD?

A. With some very small exceptions, I think it is.

Q. And those exceptions are privately-owned real estate owned by private owners or the State of Washington?

A. Yes.

Q. Within the area of the proposed Z Canyon reservoir above the shore lands and below 1990; is that correct?

A. Yes.

Q. And those rights are rights which the PUD must acquire and can acquire, in your judgment, for \$100,000 in order to complete the necessary land acquisitions to build a project at Z Canyon?

A. That is correct.

Q. And as I understand the theory of appraisal, those rights are rights which a prospective purchaser from the PUD of its left abutment uplands and of its shore lands and its easements also must consider acquiring in order to put together the complete package and build a dam at Z Canyon?

A. That is correct.

* * *

Q. Do you have, Mr. Vaughan, some sort of definition of what constitutes a bundle of rights which you believe it is appropriate to apply power site values to, as distinguished from raw land value?

A. Well, I think in my direct testimony, in arriving at the estimate of the highest and best use, I said if this bundle of rights, consisting of the fee ownership, the overflow rights, the perpetual easements, and other factors, taken as a group, constitute a bundle of rights which, with the exception of some small pieces of property remaining in private ownership, constitute all of the rights necessary to construct a dam at this site.

Q. So that the bundle, if I put it this way, presently owned by the PUD does not constitute all of the rights necessary?

A. With the exception of those already discussed.

Q. Right, those already discussed are missing from the bundle at the moment, aren't they?

A. Yes, and I have assigned a judgment valuation on those based on their highest and best use as mining claims and highest and best use for other purposes, and not for the highest and best use for a dam site. In my opinion, none of those, considered individually, separately, could be considered as constituting a bundle of rights necessary to build a dam site.

If the only thing that the PUD owned was the Z Canyon site, the only right they had was to that particular little piece of the river, I would not say that that had this valuation.

Q. So it is the shore lands which the PUD owns which you believe are essential to constitute the necessary bundle?

A. The entire bundle.

Q. Do you know how those shore lands, or the right to overflow them, are acquired in this state by one wishing to put up a dam?

A. Well, since they already have them, the PUD, the present owner already has them, I haven't been concerned about how they got them, I am appraising how they stand.

Q. I believe the reason you assigned that a person with fee ownership upstream from Z Canyon couldn't

consider that he had the necessary bundle of rights was because he doesn't have the right to overflow shore lands?

A. That is correct.

Q. Are you aware, sir, that in this state he who seeks to erect a hydroelectric dam makes application to the state for a reservoir permit, and with that reservoir permit comes the right from the state to overflow state-owned lands?

A. I believe that is correct.

Q. So it wouldn't be too much of a trick for a man who owned the fee title to land beside another dam site along that river, if he made an appropriate application to the state, to acquire exactly the same rights as the PUD has in that same reach of the river, would it?

Mr. ENNIS: I will object to this as being argumentative with the witness as to what the law of the State of Washington is.

Mr. HELSELL: I think he has gone past that, he understand this to be the law, and I think is then appropriate cross-examination.

The COURT: I wouldn't think so, counsel. What you are implying here is, if the PUD has the right to overflow the shore lands, that somebody else could get a permit and drowned out the PUD shore lands without paying for them.

Mr. HELSELL: No —

The COURT: That is what you are saying here.

Mr. HELSELL: Not without paying for them.

The COURT: That is what your question says.

Mr. ENNIS: The actual fact of the matter is that the exhibits that are in this record and have been admitted in this record show that the order that the City of Seattle got to overflow the shore lands is specifically made subject to the outstanding right originally granted to Cooper. Now, that is the state of this record as shown by the exhibits. Now he wants this witness to assume something that is contrary to the evidence here.

Mr. HELSELL: No, I think maybe I have been misunderstood.

Counsel is exactly correct. The right to overflow shore lands now given to the City of Seattle and shown by the record is subject to the right to overflow those same shore lands which the PUD holds, but the contention that it is somehow a mutually-exclusive right, your Honor, is not borne out by the record, and I submit that on that basis, this is perfectly appropriate cross-examination. There is nothing exclusive about the right to run water over a piece of ground.

The COURT: In other words, what you are saying is that you can give one person the right to flood shore lands or 10 people the right to flood the same shore lands?

Mr. HELSELL: Exactly.

The COURT: It doesn't detract or doesn't add to anybody's rights; is that what you are saying?

Mr. HELSELL: That is just exactly what I am saying, your Honor. A piece of real estate is owned by me and

I give you the right to flood it and I give Mr. Ennis the right to flood it. Now, is there anything inconsistent between your having the right to flood it and Mr. Ennis having the right to flood it? You can block the river one day and Mr. Ennis can block it the next.

I am serious about this, I am not being facetious. I really sincerely believe that this is a legitimate question.

There is no reason apparent why another dam site proprietor, who now owns lands in fee simple at Slate Creek, couldn't make application for a reservoir permit, couldn't get the same exact right that the City of Seattle has to overflow shore lands, subject to the right of the PUD to overflow those shore lands.

Certainly in a proceeding like this one, it would ultimately have to value that PUD right, but it doesn't make it impossible of acquisition.

Now, I hate to lay out all my cards on the table on this cross-examination, but I have to because your Honor has reservations about the propriety of the questions. I realize —

The COURT: I think I should sustain the objection.

Q. (By Mr. Helsell) What did you assume, Mr. Vaughan, as to ownership of the river bottom in connection with your valuation of the bundle of rights owned by the PUD?

A. I wasn't concerned about the ownership of the river bottom, because whoever had the right to overflow the shore lands would certainly have the right to

overflow the river bottom, so you gain all the benefits of the ownership regardless of who actually owned it.

Q. That assumes that the water that was going to overflow the shore lands was the same river water which already overflows the river bottom, does it not?

A. Well, I think it is a logical assumption, that if the shore lands are covered with water, the middle of the river is going to be covered, too.

Q. So you made no assumption as to who owned the bed of the river in arriving at your valuation?

A. I did not.

Q. And as I understand it, the key to your conclusions as to what constitutes the necessary bundle of rights for utilization of the valuation method you adopted is who owns the shore lands or who has the present right to overflow?

A. Who has the site upon which, presumably, a permit would be granted because of the feasibility of building at that site, and at the same time the right to overflow the necessary shore lands to create the reservoir, all of which is a part of the bundle of rights. They can't be treated separately.

* * *

Q. You have handed me a green publication captioned "Hydro-Electric Plant Annual Construction Costs and Production Expenses, 5th Annual Supplement, 1961." Is this the document which you testified you used, which includes these statistics as to power, plant land acquisition costs of other plants in the U. S.?

A. Yes.

Q. Did you use any other FPC bulletins in arriving at your conclusions as to value?

A. No, that is all.

Q. As to this document, as I understand it, you took the number of plants at arriving at a composite figure which utilized the per cent of overall cost, represented by acquisition of land and land rights?

A. Yes.

Q. You reduced that to cost per kilowatt hour of energy produced by a plant over a period of a year?

A. Yes.

Q. Then you took that per kilowatt hour figure and applied it to the figure which the Harza Engineering Co. showed the High Z could produce, and using that same percentage figure you arrived at your conclusion as to the value of the land?

A. No.

Q. Would you explain that last, please?

A. This is related to the investment, the original cost of plant, not to the cost of generation.

Q. It was original cost of plant per kilowatt hour?

A. Generation.

Q. Of generation?

A. Yes.

Q. So that you took the kilowatt hour of generation which Harza indicated could be produced by a High Z, and using the factor which you had previously arrived at for the other plants, simply applied that factor in arriving at a land value, for the land under the High Z?

A. To the entire bundle of land rights.

Q. Can you tell me what factor that was? Basically what plants you used, or whether it was for all plants shown on this group, or whether it was just a selected few.

A. No, I gave you the names of those. I think I can give them to you from memory. It was Albeni Falls, Cabinet Gorge, Box Canyon, Noxon Rapids, that was the particular analysis.

Q. Okay, then you had another analysis which you say you used as a check where you took nameplate ratings?

A. That is correct.

Q. What plants did you use in your production of a factory using nameplate ratings?

A. Brownlee.

Q. Brownlee.

A. Cabinet Gorge.

Q. Okay.

A. Chief Joseph.

Q. Okay.

A. The Dalles.

Q. Okay.

A. Davis.

Q. Okay.

A. Hungry Horse.

Q. Okay.

A. McNary Lock.

Q. Okay.

A. Noxon Rapids.

Q. Okay.

A. Swift.

Q. Okay.

A. And Upper Baker

Q. And are the figures with reference to the land acquisition costs for those dams also figures which you took out of this green pamphlet?

A. Yes, sir.

Q. Okay, did you use any other F.P.C. bulletins in arriving at your conclusions as to the value of the lands and land rights associated with those?

A. No, sir, I did not.

* * *

Q. Mr. Vaughan, on Thursday, you told us that you had made two separate statistical studies, utilizing, as I understand it, in one study, a group of some four plants on the Clark Fork River, and another being a group of some 10 plants at various locations in the western part of the United States, on which you based your opinion as to the value of the PUD land.

Do you have the work sheets that you used which show the detailed statistical study that you made?

A. Yes, I do.

Q. Could I see those, please?

A. Yes (producing papers).

Mr. HELSELL: May I approach the witness, your Honor.

The COURT: Yes.

(Papers handed to counsel)

The WITNESS: These are the four upstream on the Pend Oreille River, and the Z Canyon site, and these are the ten other projects (indicating).

Q. Do you have extra copies of these, so that you can use them as I use them, or is this your only copy?

A. That is all I have.

Q. Well, let me ask you some general questions, if I may, for a moment, then I will return these to you.

Except for the work papers that you have just handed to me, do you have any other work papers which are used in conjunction with any other studies which you made in support of your opinion as to value.

A. I have so much general background information that I used, and that aided me in my overall conclusions, in connection with my various analyses.

Q. Did you make any other detailed analysis of the kind shown on the work sheet that you just handed to me?

A. Not relating specifically to the figures which I finally used, but I had a number of calculations in connection with which I made various studies, such as comparative costs and data of that nature on the Wanapum Refunding bonds, these Swift Plant, the Wells-Hydro, and many other figures such as that, which I reviewed, but I didn't use any of them specifically in the appraisal, no.

Q. The two that you have just handed me constitute the ones which were used in your appraisal?

A. Yes.

Q. Notwithstanding the fact that you tried some other approaches and rejected them, the basis of your opinion as to value in this case are the two detailed studies which you just gave me?

A. Well, as I testified in my direct examination, my primary basis of comparison was the upstream projects on a kilowatt hour basis capacity, annual capacity, and the second study was in the nature of a verification, on the assumption that if a purchaser bought the land, the estimated value, the estimated amount of money to complete a project, what would be the comparison from an investment standpoint, on the basis of nameplate data, as to the other ten projects in the area, on the basis of original cost and reproduction cost new.

I think you will find, by referring to my working papers, that I did not extract from that valuation. I inserted in those valuations the — in those comparisons, the valuations made on the first approach, and I have another worksheet here showing the comparisons under the two different basis as to the production costs, as a further and final check.

Q. Could I see that work sheet?

A. (Producing papers) This is a summary of numerous other computations that have been made and figures extracted from them.

Q. Except for the three separate studies that you have now given me, the worksheets for the four plant study and the ten plant study, on the basis of nameplate rating and production costs, which you have last

given me, those are the three detailed studies that you made in support of your opinion as to value.

A. That is a summary of the studies, yes.

Q. And the background information which you used, in arriving at the numbers shown by these various detailed studies, among other things, included this FPC Bulletin No. S157, which you gave me on Thursday?

A. Yes, and there is another thing which I did not have, so the record will be clear, on the study of these 10 projects, in the work sheets, I have that designated in the form of two columns, the first column shows the cost, the second column shows the cost per kilowatt hour, nameplate capacity, and the next is the reproduction cost new, and in arriving at the reproduction cost new, we took the costs other than — we broke it down into reservoirs, dams, and waterways; equipment, roads, railroads, and bridges, and we applied a trend factor to that, known as the Handy Whitman Index, to arrive at an estimate reproduction cost new, which is the second column of figures tabulated on those work sheets.

So I used, in addition to the FPC, I used the Handy-Whitman index of cost trend.

Q. Which you used to bring forward from the time of plant construction the costs of reproduction of all of the parts of the plant except for land and land rights?

A. That is correct.

Q. And in then making your comparisons, you used these trended costs, as I understand it, in arriving first at a total plant cost as of today?

A. Yes.

Q. And then you used that figure as you went forward and made the comparisons that you used to arrive at your valuation for the PUD's property?

A. That is correct.

Q. Now, the figures that you got, staying for the moment with the four upstream plants, for land and land rights came out of this bulletin that you handed me Thursday, which is FPC Document No. S-157?

A. That is correct.

Q. Do you have an extra copy of this, or should I return yours to you?

A. I have copies of the pertinent information out of it.

Q. All right, what can you tell us about where the information which you took out of this bulletin comes from?

A. The information that is required to be filed with the Federal Power Commission by permit holders.

Q. Well, do you understand that the Federal Power Commission requires reports from licensees and that in those reports are contained the information which the FPC then puts in printed form in this booklet?

A. That is my understanding, yes.

Q. You have used, in your four upstream plants, for purposes of your first study two federal plants?

A. That is correct.

Q. Albani Falls and Hungry Horse?

A. Yes, sir.

Q. Is it your understanding that the proprietor of the federal plants, that is, the Corps of Engineers, in the case of Albani Falls, and the Bureau of Reclamation, in the case of Hungry Horse, has to furnish these forms to the Federal Power Commission which are required of licensees who are private proprietors?

A. I do not know what the requirements are; I know that the information is supplied, and it represents an allocation of the total cost of the project to the power portion of it.

Q. Well, now, would you give me a little more detail on that? Is it your understanding that the Corps of Engineers in its office makes some allocation of the different construction costs and land costs than are involved in its project to power and then furnishes that to the FPC?

A. I do not know who or which of the public agencies makes the allocation. I know that the figures reported in the FPC bulletin represent an allocation of the costs where they are for multiple use purposes. Some may be for flood control or for some other factor. I don't work for the federal government and I don't know enough about it to know who makes those allocations. I accepted the allocations for comparison purposes bases as shown in the FPC reports.

Q. For our purposes, some government employee just looks at the over-all cost figures of one of these federal projects, makes an allocation in terms of percentages of use involved, so to speak, that is, power or storage, and then there is printed in this FPC

bulletin that allocated portion of the total cost which, in the judgment of some government employee, represents the power production phases of the plant?

A. I think you are making a considerably broader assumption than I have. I am assuming that these allocations are made in good faith by a competent engineer and accepted by responsible government agencies. I am not taking the assumption it was made on an offhand assumption by some uniformed clerk, sir.

Q. You don't know, sir, who makes the assumptions, do you?

A. No, I do not.

Q. Your assumption —

A. But I haven't assumed it is an uninformed clerk, no.

Q. Well, I don't believe I took the uninformed clerk; I said some government employee, I think.

In any event, an allocation is made somewhere in government, if we have a project that is both storage and electric-generating facilities, as to what part of the cost is reflected by that part of the plant that produces electricity and what part of the over-all cost is reflected by that part of a plant that was constructed to store water, and it is those allocated costs which are printed up then in this FPC bulletin?

A. Yes.

Q. Do you know whether somebody in the FPC further studies the figures submitted, let's say, by the Corps of Engineers and arrives at any conclusion as

to whether the Corps of Engineers' allocations for these purposes are correct ones?

A. I would assume that if the FPC uses these figures and reports them in this bulletin, that there must be some reasonable assumption of the validity of them. I wouldn't make the assumption that they are unreasonable or capricious merely because I don't know who they are made by.

Q. I didn't ask you if they were unreasonable or capricious, I just asked if the FPC further goes over the figures submitted by the Corps of Engineers, for example, and makes a further allocation based on its experience as to what part of the costs should be charged to power and what part should be charged to storage of water?

A. I have no personal knowledge of the internal operations of the FPC. I can't answer the question.

Q. Is it fair to say that you don't know how exactly the allocation between the power facility of a government project and the water storage facility is made?

A. It is entirely correct.

Q. And you really don't know whether it is an engineer that makes it or some accounting clerk, do you, sir?

A. I have no idea.

Q. But it, nevertheless, was these figures, which are broken down into lands and land rights, reservoirs, dams, waterways, and so forth, in this bulletin that you use in arriving at your opinion as to the value of the lands owned by the PUD at Z Canyon?

A. That is one of the factors I considered, yes.

Q. Is it your understanding that in this bulletin, staying for the moment with these four upstream projects where the FPC, using information reported by the proprietor of some federal project, put the amount under land and land rights, that the dollars shown in this bulletin for a particular project are placed there in accordance with the FPC Uniform System of Accounts?

A. Yes.

Q. So that anything which is authorized by the regulations of the FPC to be placed under Account 330, which is land and land rights, is going to appear in these figures reported for these various projects?

A. That is correct.

Q. Do you know what the FPC provides in its standard system of accounts as to what kinds of items are to be included by a project proprietor in land and land rights?

A. I couldn't quote the exact, but in general terms, yes. It is the total cost of acquisition, including relocation of highways, relocation of roads, and other factors going into the land and land rights cost.

Q. Well, would you just tell me, as best you understand it, what the FPC requires be included in this land and land rights account that you have used?

A. The actual price paid for the land, the survey costs, the clearing cost, the relocation costs.

Q. Do you know of any other items which are required by FPC regulations to be put in that account

besides the ones you have just named?

A. Well, there are many sub-categories under that. It is a pretty broad definition.

Q. Well, starting with clearing cost for the moment, do you regard clearing cost of lands used on some of these upstream projects as an appropriate item to be included in land and land rights for purposes of valuing the land and land rights owned by the PUD?

A. Yes, and it is one of the reasons I made the discount factor which I mentioned in direct testimony; that these comparative studies I have made on upstream projects show the cost of the land and land rights in their present condition, which, obviously, could not be used as a direct measure of value of the subject property in its present condition. That is the reason I have made these additional allowances.

Q. Is there an allowance in your \$100,000 judgment figure for clearing costs in the lands acquired by this purchaser?

A. Some of the clearing costs are included in the Harza estimates, is my understanding.

Mr. HELSELL: Could the witness be shown Exhibit 130-A, I believe it is?

(Exhibit handed to witness)

Q. Did you study that Harza estimate in making the calculations you have made in this case, Mr. Vaughan?

A. I studied the original preliminary estimates. I did not see the final form, because it was just completed after I came into Spokane.

Q. Do you know where in Exhibit 130-A is contained clearing costs?

A. I think in the reservoir, dam, and waterway, there was some of the work in that area.

Q. I think I can help you. Item No. .11, which is in the schedule of costs shown in that document — do you find it?

A. "Reservoir Clearing," yes, in Figure 11, shown as Item No. .11, "Reservoir Clearing," in the amount of \$40,000.

Is that the figure you are referring to?

Q. Right. Well, now, clearing costs are in the cost of construction of the plant, which, as I understand it, is a different figure from land and land rights.

Are you telling me that you, nevertheless, included clearing costs in your \$100,000 judgment figure?

A. No, sir, I did not.

Q. So that no clearing costs are in your \$100,000 judgment figure?

A. Not in the \$100,000; no, sir.

Q. But clearing costs are in the land and land rights costs which you used from these upstream projects to calculate the value of land and land rights owned by the PUD?

A. As my work sheets will show on the comparison I made, the cost of land and land rights is roughly one cent per kilowatt-hour, 1.11, if I remember correctly, per kilowatt-hour. In valuing these, I have reduced that to 25 mills, or one-fourth of that amount, because, as I have stated, the direct comparison taken

from the FPC reports result in a justified or comparative evaluation, assuming all clearing had been done, or relocation had been done, the project had been erected at the estimated cost, then the comparative cost would be in the neighborhood of \$34,000,000 which I have reduced to my figure of \$8,700,000 to make allowance for these factors you have just been asking me about.

Q. Well, we will come, of course, to your exact calculation during this cross-examination, but I am trying to find out what you understand to have been included in these land and land rights figures that you used as a comparison to arrive at land and land rights value for the PUD property?

A. Well, I am certain that any relocation work was included in it as a major element of cost, which is one of the factors that influences my judgment as to the value of this property, because the relocation costs would be quite low, if any, in this project.

Q. Well, now, let's assume for purposes of discussion that in one of these upstream projects relocation costs constituted the major part of the land and land rights account; that is, relocating property owned by others; would it, nevertheless, be appropriate, in your judgment, to use that land and land rights account in valuing the PUD's Z Canyon property?

A. Certainly, I think the purchaser who had an option of buying two properties who was making a comparison would pay more for a property that did not require extensive relocation than he would pay

for one that did require extensive relocation. I think that increases the desirability of the Z Canyon site, because in comparison to Noxon, for instance, there is much less relocation required.

Q. So what you are saying is he will pay as much more for the Z Canyon site as it would have cost to relocate the kinds of properties that were relocated on these upstream projects?

A. I don't think you would use it as a mathematical comparison; I think it is one of the factors he would certainly consider.

Q. Did you notice that in the land and land rights account, in the figures, which, therefore, are involved in these land and land rights, the dollar figures in this FPC bulletin, did you notice that there are condemnation procedures, including court and counsel fees, and costs?

A. I suppose there would be, there normally is.

Q. Do you feel it is appropriate to use, as a measure of land value, what some other land value was paid in the way of court costs and attorney's fees in condemnation proceedings in acquiring those other properties?

A. Apparently I have not yet made it clear that my basis of comparison was not on the basis of an acre land value, what they paid for an acre of land, or a unit of land clearing, or relocation costs, this comparison is the ultimate reason for making an investment, the criterion being the cost of the production of a unit of electrical energy, and the sum total of the

cost, necessary to do it, plus the economic feasibility of the project.

The analysis I have made is the total cost of the project compared to the, for a unit of an identical plant, and in the upstream projects, I have taken the total investment in everything other than the construction components. What I am appraising here is the value of this dam site, which consists of all aspects other than the right to build this project, to justify the investment, and the measure of value would be what would be the total investment per unit of output.

The cheaper that any investor can build — if the City has two sites, a choice, anybody would pay more to get a land site where his construction costs would be less than he would to get equivalent land site where his construction costs would be higher, so that this comparison I have made is what, at the upstream projects he would have to invest in order to create an economic unit, measured in terms of kilowatt hours.

Q. You used those amounts, the amounts paid by the upstream proprietor, to create this economic unit, to value these raw lands that we are considering here, as owned by the PUD.

A. As a starting point, yes.

* * *

Q. Now, Mr. Vaughan, I would like to get to the conclusions which you made, which ultimately produced this appraisal of \$8,700,000 as the valuation, and before I continue on this, perhaps I should say this to the Court.

We are in the position here of having objected to the method that this witness used in arriving at his figure, we objected to this figure on the theory that the method was not an appropriate one to be used for several legal reasons which were stated.

I do not want to waive that objection by myself, putting into the record on cross examination much of the information which he used, because I can see that it is entirely possible that in some appellate proceeding, we will be charged that we produced the very evidence which we say should not have been produced.

I have in mind the Adams case where that very thing happened to counsel. He objected to the initial opinion, and then on cross-examination, got into the market value analysis made by the appraiser, and then on appeal, when he complained about the fact that the market value was considered by the man, read in the opinion that he, himself, had listed the evidence.

So I would ask, your Honor, that our entire cross-examination of Mr. Vaughan be subject to our right to move to strike the opinion which he has heretofore given, notwithstanding the fact that we may ourselves elicit some bases on the cross-examination which we will urge were inadmissible and an improper basis.

I hope your Honor sees the dilemma that the cross-examination puts us in for these reasons. For example, if I can use an illustration —

The COURT: Let us hear from Mr. Ennis.

Mr. ENNIS: It seems to me that that is a problem counsel must face. He has proceeded to date to make

no motion to strike this witness' testimony.

The COURT: Counsel, he made an objection at the time the testimony was given, and all the testimony went in over his continuing objection, so I don't think he has waived anything up to this date by not making a motion to strike.

Mr. ENNIS: If counsel wants to proceed with his cross-examination of the witness in any way that he sees fit, of course, that is his right. I think his request to proceed with cross-examination under certain conditions that he won't be bound by anything he might open up or that he might elicit or bring out by his cross-examination is new to me.

The COURT: Well, counsel, if I erred in letting this man testify, I don't think you can profit by it if counsel cross-examined him on a subject that was improperly admitted.

Mr. ENNIS: I wasn't thinking so much of profiting by it as I am the fact that if he opens up subjects and elicits testimony, certainly it can be considered, I assume, by the Court on any future rulings it might make.

not have it considered. I am not quite sure just what

I don't know just what he wants to elicit and then his objection is or what he wants to do.

Mr. HELSELL: Well, I will be glad —

The COURT: I think your bible is the Adams case, and that shows what it is.

Mr. HELSELL: I can give counsel a specific illustration of the kind of thing that we have in mind, your

Honor, if that would be of any assistance, but it is quite clear, I think, what our problem is.

We don't want to elicit appraisal theories and hearsay information which we say is inadmissible and should not be considered by the man and then be precluded from arguing that he should not have been permitted to express his opinion based on these kinds of hearsay figures on the ground that we ourselves elicited them. That is the basic problem that we have in one respect.

No. 2, we have some comparisons he has made with other projects. We have urged before that we think that that method is an improper method of arriving at an opinion as to value as to these raw lands. If we go ahead and elicit the figures and all of the facts with reference to the other projects, it might well be contended that by ourselves putting in the record these figures, we have waived our right to the objection that the method used was improper.

That is the kind of problem that confronts us, and that is why we ask that our cross-examination be undertaken with the reservation of a right to move to strike the witness' opinions earlier given based on the kinds of information which may be elicited on cross-examination which show the bases for his opinion and which we believe, when the cross-examination is completed, will demonstrate to the Court that the witness did not use a proper basis for arriving at those opinions.

I think that is as close as I can come to describing what troubles me as I launch into this cross-examination.

Mr. ENNIS: It might be true strictly applicable to what was developed as far as the witness said on direct examination, but what situation with reference to new things that he might develop as a result of cross-examination —

The COURT: I think anything new has to be pertinent to the direct, but the testimony of this witness has covered such a wide range, that I can't see that anything he might bring up would not be connected with the direct.

Mr. Helsell, let us now take our recess and you might give counsel the example to which you make reference, and then we might arrive at a different procedure in connection with the matter.

I think if you intend to bring up new matter and launch into different cross-examination, it just seems to me as though you would be plowing the ground over again.

Recess for 10 minutes.

(Short recess)

Mr. HELSELL: I might say I explained to Mr. Ennis during the recess a couple of illustrations of what concerned us, your Honor. I am not sure that they operated to persuade him that we should be entitled to proceed subject to a motion to strike, but I certainly have attempted to let him know what is the trouble, that is, the

kind of things that we may develop by cross-examination.

Mr. ENNIS: Well, I suppose they can make a motion to strike whenever they want to, and if I understand the situation correctly, counsel wants to proceed with his cross-examination and at a subsequent time be in a position to say that the PUD couldn't take advantage of anything in support of this witness' opinion that might have been developed on cross-examination because he is doing so under some sort of a reservation, and I just don't think that you can proceed on cross-examination on that sort of basis.

The COURT: I don't think you need to argue this extensively, counsel. Apparently, you two gentlemen don't see eye to eye on the subject; is that right?

Mr. HELSELL: That is correct.

Mr. ENNIS: It seems to me we should proceed just on the rules of evidence and cross-examination as we have before and as they exist.

The COURT: Counsel, I think we will just be wasting time, because I think the motion to strike would be well taken if made again.

I cannot adopt the foundations upon which this witness bases his testimony and conclusions of value. I think that it is entirely incorrect and improper and not in accordance with my ruling made in March.

Now, the valuation has to be based upon fair market value, what a willing buyer would pay to a willing seller. He hasn't based his opinion on that, and so if counsel wants to make his motion to strike, I will entertain it now.

**Direct Examination of the Witness, Neville C. Courtney,
except with reference to his qualifications, and Pertinent
Portions of his Cross Examination.**

DIRECT EXAMINATION

* * *

Q. Now, coming to the present case, what has been your connection with this case?

A. My connection has been as an appraiser or a witness to fix the fair market value of the property appraised as a unit.

Q. The property appraised as a unit?

A. Yes.

Q. What lands, did you understand were to be appraised, and I call your attention to an exhibit on the board there.

A. The lands shown in green, running from just below Z Canyon over here, to Box Canyon (indicating).

I appraised that, at the right, with the right to overflow and perpetually back up the water over that shoreland, and I also considered this red distance (indicating) this reach of the river extending from below Boundary Dam up, and it laps over the other rights so to speak, up to about right here, Lime Creek and those lands are in fee simple.

Q. What do you understand those lands to be?

A. They are below the normal high water line of the Pend Oreille River.

Q. What ownership do you understand that the PUD has in those lands?

A. I assume that you—that they had the complete ownership of the land, that Pend Oreille had.

Q. That is your understanding?

A. Yes, and also that there were 81 acres in here, out of 191, which was in my appraisal.

Q. That is the part to be taken consists of 81 acres?

A. Yes.

Q. Out of a tract belonging to the PUD?

A. Yes, which is this blue part over here (indicating).

Q. What did you do in preparation, in connection with the making of this appraisal?

A. Well, the first thing I did was to visit the site to see what in my judgment of the land it had the highest and best use for, that it could be used for, and I knew what it would be when I got there, just from general knowledge, but I was very much impressed with the Canyon, and particularly I was impressed with the very narrow Canyon that would permit an arched dam to be built from the left to the right bank for relatively low cost, and in any development, for any hydro-electric purposes, could be built there very reasonably.

Q. What else if any inspection did you make of the area?

A. I found out that a subsurface investigation had been made, that Mr. Cooper had put a shaft down on the right bank, which is the East, and then he put a horizontal tunnel under the river to where he could get under there and have a good look at the rock, and that he drilled up from the top of that tunnel to see

how porous that limestone was, and all of the information that I have received and learned about, and the drawing of his that I examined, it is exceptionally good.

I don't know that I have ever seen any limestone any better than that, and I have had quite a lot of experience. The dam in New Jersey that I spoke about had very cavernous conditions which required an enormous expense in money to retain that water in the pool.

I visited the Boundary site, and I went into the turbine hall, where the excavation was going on, and I visited many different parts of that.

Q. Why did you go there?

A. I wanted to see whether the conditions there checked with what I had generally learned a little later on about that particular site, and I was amazed at the conditions that they had.

I only saw two places at the time when I was there when they had any real shoring at all. The rock was just about as perfect as any you could get.

Q. Then did you visit any other parts of the area?

A. Yes, I visited, drove down through there, went down on the Z Canyon site as far as we could get down, to where I could get a good view of it.

Q. Any other area along the river?

A. Do you mean other plants?

Q. Yes.

A. Oh, yes, I made it a point to visit Cabinet Gorge, Noxon Rapids. I was somewhat familiar with Cabinet

Gorge. I had noticed their model made in Wooster, Massachusetts before they started their project where they had the model, to go into all the hydroelectric features of that particular plant.

I had a personal interest in it because I was now able to see the site.

As far as Noxon was concerned, I was generally familiar with that. I also visited Albeni Falls the Army Corps project at Newport.

Q. How about Box Canyon?

A. I visited Box Canyon also. I visited that site, and I was interested in it, because I had read about that in the American Society of Civil Engineers publication, all about the difficulty they had there in having an arch across there, from one side of the river to the other so that they could build this dam on the arch.

Q. On a sand foundation, in other words?

A. Yes, that is right, over a sand foundation.

Q. What if any studies did you make regarding the river system?

A. Well, I made studies, and I secured the original Army Engineers report which was made—the 308 report, which was made in 1948, and I secured the review report of the original report, which was made in June, 1958.

Q. What was your reason for doing that?

A. I wanted to be familiar with the entire power and energy picture in the whole of the northwest, and I also studied the Bonneville Power Bulletins I had

occasion to study some of the PUD power Bulletins, I studied the prospectus of the Boundary project, which is the project of Seattle.

Q. What did you learn from the Army report which was of value or of interest to you?

A. The two Army reports were quite complete. Of course they are a little bit out of date now, and they are authorizing another report to be made up, just as a continuation of these two, but it gave me a good picture of the whole set up, and I might say that I had all of the Bonneville and federal major and minor publications put out by the different agencies in the area.

Q. Why did you examine all of these publications?

A. What? I didn't understand you.

Q. Why did you examine all of these publications that you talk about?

A. Well, I wanted to learn all I could about the whole power setup in this area, and I wanted to find out whether there was a tremendous demand for power, or whether the power was not so much in demand, and that is what I was looking for particularly. I did this after I visited the site, because of the potentiality of the site. It was tremendous, in my judgment.

Q. Now, you speak about "the site." What favorable factors did you find in your investigation about that site, in connection with its highest and best use?

MR. WHITE: I object to that, your Honor, unless it is pinpointed a little more than that. I assume he is talking about physical factors.

Mr. DILL: Yes.

Mr. WHITE: We have no objection, if that is what he is talking about.

By Mr. DILL:

Q. Do you understand the question?

A. Yes. The physical factors, as I mentioned before were the excellent foundation condition, the very narrow canyon impressed me greatly, the fact that you could build such a large dam and get over 250 feet of head, it was amazing.

Usually we don't see these things in the east. We don't see them quite that big. We don't see the sites that you have here in the State of Washington.

Q. What else?

A. Well, there was no question but what, in my mind the most valuable use that that place could be put to was a hydro electric dam, there was no question about that in my mind.

Q. Well, what were some of the advantages that you thought there were in connection with a project at that place?

A. Do you mean the power?

Q. The project that was built there. What would be the value of building a project there, on that undeveloped site?

A. The fact that you could get the power out of that particular site at a very low cost.

Q. Yes, but in addition—

Mr. WHITE: I object to that, your Honor, and move that the answer be stricken as far as it went.

I take it that Mr. Dill is withdrawing the question in any event.

MR. DILL: Well, there are some other advantages in a site of this kind, and I think he can tell what they are.

THE COURT: Yes, there is no question pending however.

Q. (By MR. DILL:) What other advantages are there besides those that you have mentioned, for a project at the Z Canyon site. You have mentioned the canyon and those things, but were there any other advantages?

A. Well, it would have the ability to take some peaking on the power, you are able to peak with the storage that you have available. I have discussed the important physical features.

Q. Well, any other features, not physical?

A. Well, it has the ability to produce power very cheaply.

MR. WHITE: I object to that, your Honor, and I move it be stricken. This witness has not shown any qualifications in support of such an opinion.

THE COURT: I will sustain the objection. He has not shown any foundation or knowledge in that particular subject.

MR. DILL: Well, I don't remember now what my question was.

(Question read)

Q. (By MR. DILL:) There are other advantages in a dam site more than a narrow canyon.

The COURT: He just said that you could make power cheaper there.

Mr. DILL: Yes, that is right, the answer was not responsive.

The COURT: The answer will be stricken.

By Mr. DILL:

Q. I am asking you about the other advantages.

A. Oh, I beg your pardon.

Q. The other broad features of the project.

Mr. WHITE: I object to this, your Honor, I think he has to have a more specific question.

The COURT: All right, lead him.

By Mr. DILL:

Q. Were there any advantages in the matter of the necessary costs of railroad relocations?

A. Well, the thing that impressed me greatly was that there were no railroads to be relocated. There were no highways to be relocated, there were no bridges to be raised or built or reconstructed.

There was very little improved property that I could see in the reservoir.

The site is very close to the main transmission line that is going to be built from Canada down to Spokane, and down into the general area, a very short distance from that.

A railroad exists there within a reasonable distance, where they can bring in the materials.

Practically, in this hydro development, is in one parcel, and the time for construction would be relatively short.

There is a large amount of upstream storage in Pend Oreille Lake, Flathead Lake, in Albeni Falls Lake—I think that is the Pend Oreille—there is an enormous storage in there that will be helpful in sustaining this flow in a fairly reasonable manner, and those factors all came into my mind and impressed me greatly.

MR. DILL: I believe it is time for recess your Honor.

MR. WHITE: Your Honor, before we recess, if he is going to express a dollar opinion as to value, we would appreciate having it at this time so that we could look at it; if there is an analysis or anything else which might be in back of the figures, so that we can follow the testimony and perhaps expedite the proceedings, so we will know what this is all about.

We haven't had the benefit of anything so far, no report, if this witness has rendered to the district a report. Maybe we are not entitled to it, but we certainly would like to move the trial along. We have gotten nothing so far.

MR. DILL: I don't know of any report, your Honor, I haven't had any. I don't know what he may have done working by himself, but I haven't seen any report. I haven't known of any figures that would be of benefit to counsel.

MR. WHITE: It goes beyond a formal report, your Honor, to any statistical data, or arithmetic or mathematics which he went through, which would certainly be helpful to us, to move things along, if there are any such.

Mr. DILL: Well, I may say, the approach this witness is making, I don't think there is any data of that kind, even in his working papers. I don't know, I will investigate that, but I don't think there are.

Mr. WHITE: I wonder if we might at least know which of the three approaches this witness is using so we can at least bring to bear whatever information we have as to these approaches?

Mr. DILL: Well, I think that is a matter we can develop as we go forward.

The COURT: Yes, you may, counsel, but what I am going to do is speed this matter up.

Mr. DILL: I realize that.

The COURT: If there is any possible way we can speed this matter up by your giving any information to counsel, I would be delighted to have you do that. You have only one more day on this case, you know.

Mr. DILL: Well, I don't know of any data that we have that would be beneficial. I have had none. And I don't—

The COURT: Certainly, counsel knows what approach he is going to use in arriving at a value, don't you?

Mr. DILL: Well, I think he is going to use an approach of taking all of these facts into consideration and arriving at a valuation without any comparisons or any other figures of other dam sites or anything of that kind. That is my understanding of the witness' approach in his testimony.

The COURT: All right. Well, if you do have anything or know of anything, would you mind giving it to counsel?

Mr. DILL: Thank you.

The COURT: All right, let's recess.

* * *

By Mr. DILL:

Q. Yesterday when we closed you were giving some of the favorable factors for this Z Canyon property, particularly the dam site being considered for power uses. Have you any other favorable comments?

A. Yes.

Q. Would you state what they are?

A. The undeveloped hydro-electric dam sites in the Pacific Northwest are scarce, and the demand for power is increasing. I know of no other site like Z Canyon site.

There are large fairly well regulated flows of the stream, there is an adequate supply, a reasonably adequate supply of water for large power development at Z Canyon.

Mr. WHITE: I move to strike the response of the witness. There were several aspects to it. The first one I heard was one that certainly had no foundation behind it, the ability of this witness to express an opinion as to the market for power.

The COURT: Well, let's read over the question and the answer.

(Record read)

The COURT: And what was your motion, Mr. White?

Mr. WHITE: My motion, your Honor, as I heard the answer read back, is addressed particularly to the two elements of his response, any statement by him as to

the demand for power increasing in the Pacific Northwest, while he has shown no familiarity with the market for power here in the northwest whatsoever. He said he read several of the Bonneville bulletins, but I hardly think that that would form a basis for reaching any judgment as to the market for power in the northwest.

Secondly, he says that this dam site is unique in the northwest. As far as I have been able to determine, the only other dam sites that he has looked at are Box Canyon and Cabinet Gorge and Noxon Rapids.

The COURT: No, he didn't say it was unique, he said that he knew of no other like it.

Mr. WHITE: Well, that is true, but I think that the inference that he sought to leave was that it was unique.

The COURT: I recognize your objection, counsel, but I feel, however, that some of the things that you mention are perhaps matters about which I might take judicial notice; that there is an increase in population, and therefore an increase in the demand for power, that is something that appears in the newspaper practically every day, practically, and I think that the knowledge that the witness gains in that way, as well as his inspections, and investigation of matters are things that an expert can utilize in the expression of opinion.

I don't think that he should say how much the increased demand was, but generally, I think he can answer. I will let it stand.

By Mr. DILL:

Q. What do you understand by the term "Cash Market Value"?

A. It is that amount of cash money which a prudent, well-informed, willing seller, not compelled to sell will accept from a prudent, well-informed, willing, purchaser, not compelled to buy, will pay.

Mr. WHITE: Your Honor, I object to this witness reading his testimony in giving an answer like that, just reading a definition, I think that is entirely improper, and we object.

Mr. DILL: I think he had a right to prepare his answer in the exact language in which he wanted it. This is rather a vital definition, and certainly if it is his own composition, I don't think there is any objection to him reading it so he gets it exactly as he wants it.

The COURT: Well, counsel, the testimony of the witness is supposed to be his testimony, and if he is using notes to refresh his recollection, that is one thing, and he can do it without question, but if he has matters before him which he reads, that places his testimony in a different light, and I don't know whether it is his definition or not.

Mr. DILL: I will ask him, your Honor.

By Mr. DILL:

Q. Did you prepare this definition yourself?

A. Yes, I did.

Q. You wrote out the statement that you read, yourself?

A. Yes.

Q. It is your definition?

A. Yes.

Mr. DILL: I think he has a right to be sure that he gets the words in it that he wants, your Honor, I can't see any objection to that. I can't see any objection to his reading it. Otherwise, I can have him restate it as best he can, but I think it is better this way, and saves time.

The COURT: I will let it stand. Is he going to read his testimony?

Mr. DILL: Not all of it, certainly, but certain things he may read.

The COURT: I think that is the objection that he is supposed to be testifying from his recollection, and his knowledge, but he will be permitted, of course, to use notes to refresh his recollection.

Mr. DILL: Well, for instance, the next question is concerning unfavorable factors. Of course, your Honor, he can use his memory, but he has a right to refer to notes as to what those things are.

The COURT: Yes, he can refer to notes, but just to read his testimony, that is an entirely different thing.

Mr. DILL: Well, I will ask the question, but I feel he has a right to refer to this particular item.

By Mr. DILL:

Q. Are there any unfavorable factors that you considered in appraising this PUD property?

A. Did I understand you to say first as to the favorable ones?

Q. The first was the favorable, and now I want the unfavorable. Did you find any unfavorable factors?

A. I certainly did.

Q. What are they?

A. Well, the owner, or a prospective purchaser, has no FPC license, that is one thing.

You would have to acquire the State rights on the river necessary to build the dam at Z Canyon. You would have to get permission from the Federal Government to use their land, which had been set aside for Power Plant purposes. You would have to get the right to overflow the remaining private properties.

By investigation I have found that the mining companies, and from the evidence that I have heard here, the mining companies would not object to a low dam at Z Canyon, but they might object to a high dam at Z Canyon.

* * *

Q. (By Mr. DILL:) Did you learn anything about the withdrawal of government lands?

A. Yes, I did. I learned that the government had made a provision or set up an order that they would withdraw those lands, provided the lands were used for waterpower purposes, as early as 1910.

Q. Well, you spoke yesterday about having examined certain reports of the Army and, I think, some other reports. Did you examine any other reports than those you mentioned yesterday?

A. I examined the Harza report, and then I received some data from Mr. Stenson, of Beck Associates.

Q. Well, did you make any investigation as to the marketability of power in this area?

A. Yes.

* * *

Q. Well, Mr. Courtney, I will ask you, have you made any investigation in the area as to the marketability of power?

A. Yes, I did.

Q. Have you talked with anybody in this matter?

A. Yes, I have.

Q. Who did you talk with?

A. Well, I talked to Mr. Stenson, who has been doing a lot of PUD financing, and found out that, for instance, the Wells project had just started recently to be built, and that any power that could be produced at a site like this could be very readily sold in this area—I just picked out one illustration there—and these sites are constantly being constructed.

Mr. WHITE: Your Honor, we would move to strike any conversation that this witness may have had with Mr. Stenson. Anything that Mr. Stenson had to say, I assume, was said when he was on the witness stand. This isn't proper.

* * *

By Mr. DILL:

Q. Were you here and heard Mr. Stenson testify?

A. Yes, oh yes, I was present.

The COURT: I will overrule the objection.

Mr. DILL: Then the answer may stand, I take it.

The COURT: I think you had better ask him again.

By Mr. DILL:

Q. I think you said that you had talked with Mr.—

A. With the Bond Firm, Mr. Stenson.

Q. You had learned certain facts from them?

A. Yes.

Q. What did you conclude from the facts that you learned and from these men that you talked about, in connection with the marketability of power in the Pacific Northwest?

Mr. WHITE: Same objection.

The COURT: Objection is overruled.

The WITNESS: Shall I answer?

The COURT: Yes.

The WITNESS: That it could be very readily marketed in the Pacific Northwest Area.

By Mr. DILL:

Q. As a result of your investigation of these various facts that you have referred to, did you come to any conclusion as to the probability that the owner of this property, this dam site property, being able to develop it within the reasonably near future?

A. There is no question about it.

Mr. WHITE: I object to that, and ask that the answer be stricken, your Honor, there is no basis for that.

The COURT: I will sustain the objection. There are too many factors in that question, counsel.

* * *

Q. From an engineering standpoint, then, in connection with the question just read.

(Question read)

By Mr. DILL:

Q. What conclusion did you come to as an engineer?

A. I didn't hear the last part of the first question.

(Question read)

By Mr. DILL:

Q. What was your conclusion?

A. Well, it could be developed in the reasonably near future.

By Mr. DILL:

Q. Now, you told about making all of these studies and examining these reports, conferring with various people, examining the site, using your general knowledge and experience. Have all of these things enabled you to make an appraisal of the cash market value of the Z Canyon power site in its undeveloped state, and the rights and properties being taken?

A. Yes.

Q. Did you come to any conclusion as to the adaptability of this dam site, the special adaptability value of this dam site?

A. Yes.

Mr. WHITE: Your Honor, there is no foundation for any opinion by this witness for any dollar figure which I gather is the reason for this preliminary question.

Referring to the previous action by the Court in this case when I had a Mr. Butler on the stand on direct examination, on page 94 of the transcript, I asked Mr. Butler practically that same question, Mr. Dill objected as to whether or not, based upon his in-

vestigation, qualifications and so forth, he had an opinion as to the value, and your Honor sustained an objection at page 94.

I think we have the same situation here.

Except, however, that at that point at least Mr. Butler said what approach value he was using, namely a comparable sales approach. This witness hasn't even told us yet what approach he is going to use.

Mr. DILL: Well, on the highest and best use.

Mr. WHITE: As to the highest and best use, he has already testified as to that.

Mr. DILL: I asked him whether, with all the studies and the work he had done, whether that enabled him to make an appraisal of this property.

The COURT: He can answer that question. It is the next question that counsel objects to.

Mr. WHITE: He already answered the question counsel refers to.

Mr. DILL: Yes, that was the question as to the special adaptability of the site.

By Mr. DILL:

Q. Now, is there any difference in appraising a dam site, and properties of this kind in the State of Washington? Is there any difference in the method used in appraising a dam site in the State of Washington as compared with a dam site in other states where you have had experience?

Mr. WHITE: That is an improper question, your Honor, and objected to. We objected to that same question in connection with the testimony of Mr. Ober-

billig. What we are interested in here is the approach to the valuation, not what approaches were used in Arkansas or in New Jersey.

The COURT: The objection is overruled.

Mr. DILL: Now, your Honor, I was just going to say that practically all the questions which I have been asking and which I have been relying on, were found in almost the identical language in the transcript of the record in U.S. Supreme Court, in this Grand Hydro case, where the evidence was placed before the U.S. Supreme Court—it had been before the Oklahoma Supreme Court, and practically in all of these questions that I have asked, I have framed on this order as being the method that we had right to use for a witness to arrive at appraised value.

The COURT: I sustained you on the last ruling, counsel.

Mr. DILL: I just wanted to remind the Court. Counsel says he doesn't know the method of approach. I think that by this time he could see that it was the method of an expert witness, study all the facts, all the conditions and arriving at an appraisal value, that is the method I am using, it was the method that was used on three evaluation experts.

I have the complete transcript here (indicating) and actually I talked to Mr. Hudson and I have a letter from him. He handled this entire case and he says that this is a complete examination of the witnesses on valuation used in the Grand Hydro case. It is unusual, it is different, but in the light of the

Court's ruling, I know of no other approach that I could use which would be admissible in this situation, and that is why I have followed this method. I am just using the opinion of an expert witness without going into anything else.

The COURT: I think you misunderstood me. I said that I sustained you and I would overrule the objection.

Mr. DILL: I am sorry, your Honor, I misunderstood. I appreciate the information.

By Mr. DILL:

Q. Did you appraise this dam site?

A. I didn't answer the preceding question.

Q. You didn't answer the preceding question?

A. No.

(Question read)

A. No, the method of appraisal is the same.

By Mr. DILL:

Q. Did you appraise this dam site as an undeveloped dam site on the Pend Oreille River?

A. Yes, I did.

Q. I will ask you to state to the Court the cash market value of the dam site with the other property of the PUD which you have appraised?

Mr. WHITE: Your Honor, I object on the grounds previously stated. There is no foundation for the expression of any dollar value opinion by this witness. Now, as I understand the statement of counsel, he has not used any one of the approved methods of approach to this problem of valuation. Counsel says

that he is trying to follow the Court's ruling in the Grand Hydro case, but I think U.S. Supreme Court took no view whatsoever in respect to the question of whether or not that was a good, bad, or indifferent method.

Secondly, it appears from opinion of the Oklahoma Supreme Court that the method used there was an entirely different method from that which is being attempted here. There the method used was the steam comparison method. They set up a hypothetical dam v. a hypothetical steam plant, and got the value of this hypothetical power, and then the witness, after extensive economic analysis made a comparison and testified as to the fair market value, and I think that shows right in the opinion.

Mr. DILL: Well, I might say that this is the evidence, the transcript of the record that went up from the State Supreme Court, and was approved there, the Court approved the action of the State Supreme Court, and it is on the basis of the theory that an expert witness who investigates all these things is competent to express an opinion as to the value of the property. It is the only method that I have, it is the only method that I think I can use in the light of the Court's ruling, that there can be no computation of all these various figures to arrive at a basis. I just don't have anything left. This is a method that has been approved.

Counsel has no evidence here to show that this is not the testimony given, that it was shown to the

Court, and I can introduce it here in evidence if it is necessary.

Mr. WHITE: I would appreciate it if counsel would point out any case in any Court where the court has approved this method of evaluation in which a witness comes to any conclusion like this, in which he gives no background for his opinions other than the fact that he lives at the site, that it looks like a good site to him, and that he talked to some people about it.

Mr. WHITE: You will have to show the approaches he is using, just as you objected to the testimony of Mr. Butler, and I can think of no occasions to cite on that which express it better than in Nichols, at page 168, Sections 18 and 42. We should not have to cross examine this witness at our peril. I don't think it needs any citation that an expert witness must establish fully on direct examination the basis and his background in support of his opinion. It is not up to the other side to develop that on cross examination.

The COURT: No, I feel that the testimony on qualifications should contain some information as to what he used as a yardstick.

Mr. DILL: I am willing to do that, but yesterday the Court struck the testimony of the other witness who proceeded to use a method of calculation, using figures, rather than to just base it on his experience and his judgment, so I found it was of no value in this case, and I suggested proceeding along this method as approved by the U.S. Supreme Court.

The COURT: That wasn't in question in the Grand Hydro case, was it?

Mr. DILL: This is the evidence that was presented. I didn't read the proofs, your Honor.

The COURT: It wasn't questioned?

Mr. DILL: Yes, they questioned the whole situation in the Supreme Court, this is the method which was used in arriving at the amount of money which the jury gave which the Supreme Court of the State of Oklahoma has approved, and U.S. Supreme Court affirmed.

Again, if I start to mention the method of arriving at these matters, by figures, then I am in trouble, because I am using a comparison method, but if that is allowable, I am willing to go ahead and ask him how, if he arrived at this particular appraisal value, but if I go ahead and do it, and it is stricken, for that very reason, I had better stay away from it. That is my reasoning.

Mr. WHITE: On those four citations, in the Grand Hydro case—it is sometime since I have read them, but I have a note here in my legal notes that there is no mention or debate as to the theory of valuation used, and it appears from a recitation of the facts in one of the leading court cases, that it was some alternative approach, an approach which is not used by this witness.

The COURT: We will recess for ten minutes so that counsel can confer.

The COURT: You may proceed.

Mr. DILL: If the Court please, I have here the photostat copy of the decision in the Grant River Dam

Authority vs. The Grand Hydro, 201 Pacific (2d), 225, which is the Ninth Circuit, and in speaking about this testimony that I have referred to and the kind of testimony, the Court said:

“The testimony of the expert witnesses, as introduced, was therefore competent to prove the dam site value of the property and was in accord with our opinion on the former appeal to the same effect as the California case of Metropolitan Water District, wherein there is an extensive discussion of many of the points involved.”

Now, that referred to the kind of testimony—not the kind, but the actual testimony—that was used in the Grand Hydro case from which the appeal was taken.

Well, I thought the question here was whether or not I was to be allowed to go ahead and ask this witness for his value and then, if necessary, fix the basis of it afterward.

The COURT: I think, in view of the objection, that we should have from him some evidence as to the basis of the valuation in advance of the figure, and also the theory on which he valued the property.

Mr. DILL: Well, I want to call attention, before I do that, take up that question, in the case of Puget Sound Power & Light Company against the City of Puyallup, 51 Federal Reporter, 688, in which the same kind of testimony was used:

“It would perhaps have been better for the parties, after qualifying their witnesses, to have merely asked the basic question: what is the market value of the property taken, and what is the depreciation of the market value of the property retained by depreciation of its severance from the property taken—”

and that is the method I am trying to follow,

“—giving the witness full opportunity to explain the bases of their valuation. In such case, no doubt, the same question would come up on direct and cross-examination, for if it appeared, either on direct or cross-examination, that the witness has pursued a wholly unwarranted course in arriving at his estimate of value, it would be necessary to make correction thereof either by striking out his estimate of the market value or by instructing the jury to disregard that portion of the testimony.”

So that I see it makes little difference whether I ask him the basis of his valuation before or afterward. I was trying to follow the method here suggested by the Ninth Circuit, but if your Honor thinks that I should follow the other method, I am willing to do that.

THE COURT: One of the reasons was we did that with Mr. Vaughan here. Now, if there isn't any objection on counsel's part, we can do it the other way.

MR. DILL: Counsel objects to everything I want to do, I suppose he objects to this.

MR. WHITE: I do. I'm sorry to be put in that position, but actually—

Q. (By MR. DILL) Well, I will ask you, then, what was the basis of the valuation that you made?

A. Well, I studied the Harza report, I found what the cost of the project would be—I found out, that is, what the installed capacity of the plant would be; I found from Stenson's testimony what the cost of the energy would be; then I took into account all the favorable factors that I have enumerated and also all

of the unfavorable factors, and after doing all of this, I used my judgment as to the fair market value of this undeveloped dam site appraised as one unit.

Q. Well, now, I will ask you to state what that cash market value of the dam site, with the other properties, is?

Mr. WHITE: Your Honor, we object on the same ground. He hasn't furnished any yardstick, as your Honor put it, yet, and he hasn't stated the theory on which he valued the property, the two ingredients which it has been stated are necessary in order to give an opinion.

Our research indicates that the only jurisdictions, basically, in which a witness is permitted to give his opinion before he gives any basis, or irrespective of the basis and just merely gives his judgment, are in the jurisdictions where the comparable sales approach is not permitted. I think in Pennsylvania, and one or two other states, where that is permitted. But certainly here, he has got to state what the theory is and what yardstick he used.

Mr. DILL: Well, he testified there were no comparable situations. He testified he used these figures as a basis on which he built his estimate of value, and if counsel in cross-examination wants to develop that, he can. But that was the basis on which he came to a conclusion of the valuation. No comparisons here, simply takes the valuation, in light of his experience, his knowledge, the facts he had learned in this area, and considering everything favorable and unfavorable, he arrived at a valuation. And certainly—

Mr. WHITE: Just gives a figure, your Honor. He must have gotten it from somewhere and used some yardstick, and I don't think it is the burden upon us to develop how he built it up.

Mr. DILL: But he told the yardstick that he used.

The COURT: Well, I didn't hear it. He is converting all these things into dollars. What does he use to measure the number of dollars with?

Mr. DILL: By his own judgment and experience. He has to rely—

The COURT: He has got to base it on something, doesn't he?

Mr. DILL: Yes, he based it on these figures, after he had all of them before him.

The COURT: What is the yardstick? If you are going to buy or sell a home, you will look at another home and find out how much that sold for, don't you?

Mr. DILL: He can't do that.

The COURT: He must have used something.

Mr. DILL: Well, he said he took all these various things that he learned from various reports and he learned the cost of this power, and then, knowing it could be sold in the area, he made an estimate from his experience as to what would be a fair valuation between a purchaser and a seller.

The COURT: Do you know on what basis he made it?

Mr. DILL: Well, I thought that was the basis.

The COURT: Well, did he take the revenue from the power and take off the cost of producing it?

Mr. DILL: No, no—

The COURT: And make the calculations?

Mr. DILL: You get then into a situation where your Honor said we couldn't follow. That is the ordinary method, I must say, your Honor.

The COURT: For appraising raw land?

Mr. DILL: Well, for appraising property of this kind, which has a special value for its adaptability.

I must say that it seems to me we are far from realistic by not being able to go into these figures as a buyer and a seller would, which your Honor has ruled we can't do that, and so we have to rely on the expert witness having to learn what the facts were about this project, and without regard to other projects, knowing the marketability situation, he can estimate.

The COURT: Why do you do it without regard to other projects?

Mr. DILL: Well, because it has been forbidden, we couldn't do that.

The COURT: Why?

Mr. DILL: The Court ruled yesterday, as I understood your Honor, that because he made comparisons with other projects, that the approach was wrong and couldn't be used. If I am wrong in that—

The COURT: No—well, other projects where raw land has been sold.

Mr. DILL: Well, I don't know of any. There isn't any so far as we can learn, raw land with this kind of a situation.

The COURT: All right, I didn't intend to argue with you, counsel.

Mr. DILL: No, I know, but I want to be clear. I didn't understand your Honor's ruling. I understood that because he took the comparison with these other sites, the costs in these other cases, that it must be stricken.

The COURT: You asked him, as I recall, whether he had ever given value—

Mr. DILL: Yes.

The COURT: —of raw land for power site purposes.

Mr. DILL: Yes, I did ask him. He said he did it in two or three cases. He did it in the Twin City case, he helped Justin prepare it in the Tennessee Valley case, Powelson case, he did it on an Arkansas case, he had worked out this sort of thing. He is not without experience in that work.

The COURT: No, but he must have used some method, didn't he?

Mr. DILL: Well, I suppose he did.

The COURT: Can't he testify what method he used?

Mr. DILL: He had comparative properties there, but here there are none, and, of course, it seems to me there must be some way that an expert witness can give a valuation, and there are no comparative sites. Yesterday it was pointed out that the sites that were used were not comparable in any way, a lot of things in them, and this is a unique site, it is a different site, and it seems to me he must rely on his experience as an expert witness to fix what in his judgment, after considering all the favorable and the unfavorable—and I must say he was certainly frank in having considered all the unfavorable things—he has a right to

give an estimate. And if counsel on cross-examination shows that his method was improper, why, of course, the Court would strike the testimony.

I don't know how—I can go ahead, but you can't compare it with others, because there is no other where we have a similar kind of property to be valued, raw land value.

This thing is unique. You can go all over the country. I suppose Hells Canyon is about the only place where you could get anything like this, and investigation down there was the State of Idaho and 90 per cent of it was government, there was no purchase from a private owner or anything of the sort, and the liberality which the courts have shown in their efforts to be fair, in their efforts to arrive at fair treatment of an owner, have grown more liberal as the years have gone by.

These cases cited here, this method used in the Hydro case is completely without any basis, simply that he studied all these things. If your Honor will permit, I would like to read some of the questions and answers so that you may see what this testimony is.

The COURT: I don't think you need to, counsel.

Mr. DILL: Well, it seems to me, when this method has been allowed and approved, your Honor will not be in error to follow a similar method which was approved both in the Oklahoma State Supreme Court, as I read here, and was approved then by the United States Supreme Court; that is, the value arrived at was approved, they didn't discuss the particular method.

My co-counsel suggests it is a matter of discretion with the Court. It is not an abuse of discretion to allow it to be considered, give it whatever weight may be felt proper to give it, but—

The COURT: Can this man testify as to what methods he used to value the property in these other cases?

Mr. DILL: Yes, I think he can. I will ask him what methods he used in other cases.

Q. What method did you use, for instance, in the Twin City case, where you were a witness, to value the raw land, the raw, undeveloped dam site?

A. Well, one approach—in that particular case?

Q. Yes, in that particular case.

A. It was worked out on the basis of capitalization of earnings, one method. Another method was comparative sites, which was something along what Mr. Vaughan—which was along the general line that Mr. Vaughan had, and the general experience of the combined men that served on that, on those three engineers who were employed by Twin City.

Now, any one of those factors wasn't the whole factor. The judgment factor was the big factor.

Q. Judgment factor of whom?

A. The judgment factor of each one, each witness.

Q. Expert witnesses?

A. Yes, that's right.

Q. Yes.

A. The judgment factor of how you arrive at the final answer can't be worked out by multiplying something by something and dividing by "Y" and come up with an answer. You have to go to the experience of

the man that is working on the job.

The other methods that I mentioned were simply methods that were used to help check the proposition.

Q. Well, then you say you assisted Mr. Justin in the Grand Hydro case, and how did he arrive there at his judgment?

A. Well, judgment was a big factor, very big factor, in that case, but there were some figures made up on capitalization.

Q. On capitalization, but were they used as controlling in any way?

A. Oh, no. No, they weren't controlling.

Q. And as to his testimony, do you know whether he set forth at any time how he arrived at it?

A. No, not to my knowledge.

Q. Either, I may say, on direct examination or cross-examination.

Have you any other experience as to how you prepared, made up, the valuation of a raw land, undeveloped dam?

A. Well, when we did the Powelson case, as I told you yesterday, the method that we used, one of the methods, was the capitalization method. Comparative site, in a way, but that had very little weight in that particular case because it was involved, and it came down again to judgment.

Q. Of the appraiser?

A. Judgment. After we analyzed it and debated it, it came down—we had to decide it on the basis—

Q. What was the basis in these cases on which it was decided?

A. Well, the final decision was made in every one of them on the basis of judgment.

Mr. WHITE: Your Honor, I move to strike that, quoted opinions.

The COURT: I think that is a conclusion of this witness.

Mr. DILL: Well, I was simply asking these questions as to what method he had used there, and those methods, such as capitalization of others, are not to be considered here and not allowed here, and so we have followed the method that was used and approved in other cases; namely, that, as an expert witness, he considered them and he took these figures from the reports that he had and he found out all these facts, and from those facts, namely, the cost of the power and knowing there was a market, the general knowledge of everything here, he then made an estimate of what a willing seller and a willing buyer might agree upon.

It is indefinite, it is uncertain, it must be in somebody's judgment, and the expert witness is the only one that can make such a judgment, it seems to me.

And I think he should be allowed to give his estimate on the basis that he stated here, that he used these reports. He didn't attempt comparison, because there are no comparative properties, nothing like it in the whole country, even here in the Pacific Northwest. And, of course, if your Honor takes the position that you can't use comparative sites, as he did yesterday, as I understood—

The COURT: You misunderstood the ruling, counsel. The testimony was stricken because he based his opin-

ion of the fair market value on the ratio of operating projects, the land ratio to the power output and income.

I think that was an entirely incorrect basis. That is the basis upon which his testimony was ruled out. I think it is very clearly spelled out in the record.

Mr. DILL: Well, do I understand, then—

The COURT: I think if this man could tell what method he used to value this property, his testimony might be admissible, but do you object to his telling?

Mr. DILL: No, I thought he did explain.

The COURT: Why don't you let him answer?

Mr. DILL: I thought he did explain.

Q. Will you explain again what you did to come to these figures?

A. Well, I studied the Harza report, I obtained figures from Stenson on the cost of energy, I found out the installed capacity, and then I took into account all these favorable factors that I enumerated, all the unfavorable factors that I enumerated, and from that information I came up with—

Q. Well—go ahead.

A. —came up with what, in my judgment, was a value.

Q. Well, did you—

A. Now, of course—pardon me.

Q. Did you attempt to figure out or use in your arriving at that value the cost of the power to an owner who might develop here, an estimate of that cost of power?

A. Yes, yes.

Q. And you considered that in connection with the and and the land rights that would have to be secured, how much you could allow for them?

A. Yes. Oh, yes.

Q. And after doing that, using your judgment, considering all these things, you arrived at a valuation that, in your judgment, was fair?

A. That's right.

Mr. DILL: If we want to go in and put down all the figures, but there are no comparable projects that I know of on this particular thing, and it seems to me that we can have him demonstrate these figures, if the Court would like.

The COURT: Do you know whether he used the comparative sales method or the capitalization of net earnings method to arrive at a value?

Q. (By Mr. DILL) Did you use the capitalization method or the earnings method to arrive at your value?

A. Well, I used it somewhat as a check method, yes.

Q. A check method?

A. Yes.

Q. You worked out the capitalization as a check method?

A. Yes. That is only one. Bear in mind that that is only one part of this whole picture.

Q. No, but in arriving at the valuation, you finally arrived at it, what did you base it on? Did you use the earnings method of the project?

A. I used all of the methods. I used capitalization and I used the comparative sales, I couldn't help in thinking about it. When a man writes a report and says you can get 550,000 kilowatts out of this plant and he gives you the cost, immediately you know what the cost of the project is per kilowatt. That is used all over the country by everybody. You know how good the project is by what it cost. I have to take that into account. I can't escape it. It surrounds you, all these things surround you, but none of those particular methods—

Q. You didn't use—

A. —are solely the method that you use, because when you come out, you have got to come down here, you have got a place that is a very easy dam to build, you got good foundation conditions, you have no railroads to move—

Q. Well, now, wait, let's keep back to these figures.

What I want to get at is, in figuring the land rights cost, what figures did you rely on to arrive at your conclusion? I think that is what the Court is interested in.

A. You mean the method?

Q. Well, the method, yes. How did you do it?

A. Well, I said the capitalization method.

Q. I know, but you took these figures from the report of Harza, you took the data you got from Mr. Stenson—

A. Stenson.

Q. —and, as I understand you, you used them to arrive at the cost of the power to a producer or a developer of this dam?

A. I took it into consideration, yes.

Q. Well, didn't you use that? What did you use?

A. Yes, I used that.

Q. Yes. And then how did you arrive at a cost for the land rights that you have to develop with here?

A. Well, I have another method—

Q. No, no, what method did you use?

A. I used a number of things that I combined into a judgment figure.

The COURT: All right, counsel—

The WITNESS: Huh?

The COURT: Just a moment.

I think probably, to speed matters up, if you let him testify and give his figure, and then confront the matter on cross-examination, if it is necessary. So I will permit him to answer.

Mr. DILL: The amount of his valuation?

The COURT: Over counsel's objection.

Q. (By Mr. DILL) What valuation did you put upon this property as a raw dam site, as an undeveloped dam site, along with the other properties of the PUD in the river?

A. The amount of money in cash, as the fair market value, is \$7,500,000 before the taking, and \$7,498,000 after the taking. I valued the 191 acres—or the 110 acres, after the taking, as \$2,025, which I rounded out at \$2,000.

Q. How did you arrive at the \$2,025?

A. Well, I took 191 at \$25, which was \$4,775, and I took 110 at \$25, which was \$2,750, and that left \$2,025, and I just established it as \$2,000.

Mr. DILL: That is all, your Honor. Counsel may cross examine.

* * *

CROSS EXAMINATION

Q. Now, can you tell me how you reached this figure of \$750,000, and I am not interested—

Mr. DILL: 750?

Mr. WHITE: \$7,500,000.00.

Q. I am not interested in your repeating what you relied on as I am what arithmetic you went through to arrive at this figure?

A. Well, if I may go to the board, your Honor, I will try to explain it so it can be understood.

The COURT: Yes. You had better wait until counsel asks you about that.

Mr. WHITE: Well—

The COURT: You didn't ask him to go to the board.

Mr. WHITE: All right—

The COURT: What do you want him to do?

Mr. WHITE: If you would be more comfortable to work at the board, Mr. Courtney, by all means.

A. Well, I can do it here.

Q. All right, either way. If you can do it from your present position, why, go ahead.

A. Okay.

The COURT: Would you rather do it at the board?

A. That is all right.

Mr. DILL: Do you understand the question?

A. I understood he wanted to know how I arrived at \$7,500,000.

Mr. DILL: Yes.

A. In other words, what is my method of approach.

Mr. DILL: Yes.

A. In order to get the price.

Mr. DILL: All right.

A. I established—or I didn't—I took the figure that Mr. Stenson had worked out for the cost of the energy in mills per kilowatt-hour for no land in the estimate—

Q. (By Mr. WHITE) Would you give us that figure, please?

A. That is 1.59. Then I found out by computation, with \$10,000,000 assumed to be added to the bond issue cost, or the over-all cost of the project cost, plus Mr. Stenson's overheads and bond cost and interest on construction and all such things as that, I found out that it would cost 1.72 mills per kilowatt-hour.

I went up another step and did the same thing, if I added 20 million dollars to the cost of the project, and that came to 1.85.

Now, that happens to be a straight line on a slope, because, you see, it is increasing from 1.59 to 1.72 to 1.85. That would be for the High Z. Now, that could have been carried further up on the High Z, I could have gone to 30 million.

But then I went over to Low Z and I took the figure that he had established for the cost of energy, no land included at all, except my item of half a million—and I trust you understand that that is in the bond issue. I put a half a million in there—

Q. You added the half million dollars to the construction costs?

A. I added, on top of all of Mr. Stenson's figures, on top of all of Harza's figures, I added half a million in. I got 2.4 that he had established in mills per kilowatt-hour for no land.

I went up to the 10 million line and I established or found that it would take 2.63 mills per kilowatt-hour. Then I went up to the 20 million line and I found that that would be 2.86 mills per kilowatt-hour.

Now, when I got those curves, I could readily see that adding as much as 20 million dollars into this project for land, the cost would be under 2 mills for High Z Canyon, and it would be under 3 mills for Low Z Canyon. My conclusion immediately there was that it was an extremely valuable computation by using the cost, which I will call the cost method.

I used my judgment as to what point on this curve I should adopt as my fair market value. I knew several things from experience about how much the land would cost, in general, in relation to the cost of the total project, and I finally came down to a final answer that with seven and-a-half million allowed for land, the cost of the power would only be 1.69 mills per kilowatt-hour, and, likewise, if I went over to the Low Z, it would—I haven't that line on here, but it would be approximately, oh, about 2.6 mills per kilowatt-hour.

So, in any case, the project is extremely favorable, and there is no question but what the power could be marketed, and it is a very valuable, undeveloped land site.

Chapter 125 of the Session Laws of 1907**"GRANTING THE RIGHT TO OVERFLOW STATE LANDS
FOR CERTAIN PURPOSES.**

"An Act providing for and giving and granting the right, privilege and authority to perpetually back water upon, overflow and inundate with water, lands belonging to the state of Washington, in the erection, construction, maintenance or operation of water power plants, reservoirs, or works for impounding water for power purposes, irrigation, mining, or other public use.

"Be it enacted by the legislature of the State of Washington:

"Section 1. That there be, and is hereby, granted by the State of Washington the right, privilege, power and authority, to any person or corporation, to perpetually back and hold water upon and over any land belonging to the State of Washington, and to overflow any such land and inundate the same, if it be necessary in the erection, construction, maintenance or operation of any water power plant, reservoir or works for impounding water for power purposes, irrigation, mining or other public use.

"Sec. 2. The right, privilege, power and authority herein given and granted shall not be exercised or enjoyed until application shall first be made to the Board of State Land Commissioners to have the amount of damages appraised and fixed, which shall be done within sixty days after such application is made.

"Sec. 3. When and as soon as said damages are so fixed and assessed by the Board of State Land Commissioners, the same shall be paid to said officer.

"Passed the House February 26th, 1907.

"Passed the Senate March 6th, 1907.

"Approved by the Governor March 11th, 1907."

Excerpt from the report of the Commissioners to the Honorable C. C. Wycke, United States District Judge for the Western District of South Carolina and to the Honorable F. M. Scarlett, United States District Judge for the Southern District of Georgia in the Twin City litigation.

Therefore, it now remains to determine what the value of these properties were for water power purposes.

In reaching a decision on this question, the Commission is fortunate in having had the testimony of very skilled, capable, competent, learned and experienced hydro-electric engineers, and we were greatly impressed with the testimony that was given by those witnesses.

Dr. William P. Creager, Mr. R. C. Johnson, Mr. Neville C. Courtney, witnesses for Twin City, and Mr. William A. Farley, Mr. Harrison G. Roby and Mr. Eugene F. Logan, witnesses for the plaintiff, are all hydro-electric engineers of the highest standing, whose knowledge and capabilities in that field are beyond question.

As heretofore stated Mr. Logan, witness for the plaintiff, testified that the holdings of Twin City constituted a good site for a hydro-electric power development, but his testimony consisted principally in an explanation as to why it was impossible to accurately determine such water power value. Mr. Farley's testimony was confined principally to the fact that Twin City could not have gotten a license from the Federal Power Commission to construct such water power development at Price's Island and the river valley above;

but he did state, during the course of his testimony, that Twin City's site was a good one for a hydro-electric power development, but not as good as that at Clark Hill. Mr. Roby did not question the fact that the holdings of Twin City constituted a suitable site for the establishment of a hydro-electric power development, but his testimony was confined almost exclusively to explaining why such development would be of no value, since an equivalent amount of power could be generated by steam at less expense than by the hydro-electric development.

To go into the testimony of these witnesses at length is neither necessary nor called for, and would certainly unduly prolong this Report. However, we call attention to the testimony of Mr. Roby, as contained in pages 476-579 of the Record, and then to the reply testimony of Mr. Courtney, contained in pages 907-945 of the Record, and particularly Twin City's Exhibit 43-1, contained in pages 944 and 945 of the Record, in which he analyzes Mr. Robey's estimates for the cost of construction of a hydro-electric power installation at Price's Island, and the annual cost of producing power by water, and then shows that such computation is based upon much higher figures than those prevailing for work being done by private individuals and corporations during the years 1947 and following, which were the years in which these properties of Twin City were taken by the United States.

Dr. Creager, Mr. Johnson and Mr. Courtney were all clear in their opinions that the holdings of Twin City

constituted valuable property for water power purposes, either taken alone, or in combination with lands of others to establish a much larger hydro-electric installation.

Mr. Johnson valued the holdings of Twin City for water power purposes, at a minimum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars. (Record, 265). Mr. Courtney, in his testimony, stated that these properties of Twin City had a value, for water power purposes, of at least One Million Nine Hundred Thousand (\$1,900,000.00) Dollars. (Record, 310). Dr. Creager valued the properties of Twin City, for water power purposes, as having a fair market value of One Million Six Hundred Thousand (\$1,600,000.00) Dollars. (Record, 151).

Before determining what we conceive to be the fair market value of the property of Twin City taken from it in these proceedings, it seems that some explanation should be made of the manner in which these engineers arrive at their water-power valuations of these properties.

Actually, as stated by Mr. Logan, there are some four different methods for evaluating potentially integrated water power sites, they being:

- (1). Comparative sales of completed power projects of substantially similar nature in the same section of the country;

- (2). The steam plant comparison method;

- (3). The comparative cost of completed project of substantially similar nature in the substantially iden-

tical section of the country; and

(4). The actual legitimate initial cost. Mr. Logan, in his testimony, stated that the property of Twin City could not be properly evaluated by any of those four methods, and finally testified that he knew of no manner by which the water power value of these properties could be accurately and properly ascertained. (Record, 594). However, during the course of his testimony, he explained that method (4), above set out, was used more as a base for rate making, rather than evaluating property.

From the testimony of all the witnesses, it developed that there have been no comparative sales of completed power projects of a nature substantially similar to the holdings of Twin City, and that there have been no completed projects of a substantially similar nature in this section of the country, the cost of which could be compared with the cost of establishing a completed project in and along the Savannah River at the location of the property of Twin City. For this reason, therefore, it developed that all the witnesses, in the main, had taken the steam plant comparison method as one of the principal bases for arriving at the water power value of the property of Twin City, taken by plaintiff in the above entitled actions. In that connection, we wish to make it clear that the figure arrived at by the so-called "steam plant comparison method," was not taken as an absolute guide, or basis, but was used as one of the principal bases, together with numerous other factors considered by these ex-

pert witnesses who evaluated the property taken from Twin City as being suited for a potentially integrated water power project.

Briefly stated, the steam plant comparison method is used as follows:

These expert hydro-electric engineers first computed the annual cost of producing a definite amount of electric power by water, and then computed the annual cost of producing the same amount of electric power by steam. The difference between the annual cost of producing the power by steam and by water was then computed, capitalized on the basis of six (6%) per centum, which was considered to be the current and sound value of money, and such capitalized value was taken as a principal factor in arriving at the water power value of the property taken. Of course, such capitalized value of the difference between producing power by steam and by water was never taken as the true value of the hydro-electric site, but was considered as being of controlling influence in arriving at such valuation.

After considering all the evidence before us, this Commission is of opinion that the valuation given to the property of Twin City, for which it is entitled to receive just compensation in these actions, is that reached by Dr. Creager, being the sum of One Million Six Hundred Thousand (\$1,600,000.00) Dollars, as hereinafter modified, for reasons set out below.

Dr. Creager gave various estimates of the value of this property taken from Twin City, varying the estimates in accordance with the heights of the head of

water resulting from the construction of dams at the lower side of Price's Island. His calculations were based upon a 60-foot head, a 70-foot head, and an 80-foot head and, as appears from his testimony, the larger the head the greater the value. In that connection, however, the evidence clearly establishes, in our opinion, that what Twin City had had in mind was the establishment of a hydro-electric project with a 60-foot head of water, and our conclusions herein are based entirely on the premise that Twin City had a potentially integrated power site for establishing a hydro-electric plant with a 60-foot head of water. In our opinion, the evidence does not justify us in reaching the conclusion that any higher heads of water than that should be considered.

In reaching his conclusion that the proper valuation of the property of Twin City was One Million Six Hundred Thousand (\$1,600,000.00) Dollars, Dr. Creager first figured that the annual cost of producing the power which a hydro-electric plant, with a 60-foot head of water, would produce was One Million Two Hundred Four Thousand (\$1,204,000.00) Dollars. (R. 182). The annual cost of producing an equivalent amount of electric power by steam would be One Million Three Hundred Forty-three (\$1,343,000.00) Dollars. (R. 179). That gave the water produced power an annual advantage over steam produced power of One Hundred Thirty-nine Thousand (\$139,000.00) Dollars; and capitalized at Six (6%) per centum, this gave the potentially integrated power site of Twin City a theoretical

value of approximately Two Million Three Hundred Thousand (\$2,300,000.00) Dollars. Using that as a guide, Dr. Creager then valued this potentially integrated power site at One Million Six Hundred Thousand (\$1,600,000.00) Dollars, the difference of some Seven Hundred Thousand (\$700,000.00) Dollars being to cover fluctuations in market, the risk that a prospective developer of this project would have to take, fluctuations in demand for power, additional lands that would have to be acquired to complete the project, and other factors best known to that particular witness. In reaching this valuation of One Million Six Hundred Thousand (\$1,600,000.00) Dollars, Dr. Creager computed that Twin City would have had to acquire an additional four hundred (400) acres of land, in order to have the necessary storage reservoir, with a height above the pond level to afford a satisfactory measure of safety in case of high water. He estimated that these additional lands would require the expenditure of Four Hundred Sixty (\$460.00) Dollars per acre, which he designated as the hold-up value which would be required to acquire these additional lands without the exercise of power of eminent domain. (R., 174, 175). The cost of acquiring these additional lands was taken into consideration by him in reaching his valuation of One Million Six Hundred Thousand (\$1,600,000.00) Dollars as just compensation for the value of lands taken from Twin City.

In our opinion, this represents a sound basis for arriving at the value of the lands taken from Twin

City, and the just compensation to which it is entitled, but we further are of opinion that, in reaching this conclusion, Dr. Creager did not feel that Twin City had no rights in the 745.58 acres of land which have been designated as "option acres"; and, as above stated, it is our considered opinion that Twin City had no rights in said acres, under the so-called options, at the time of the original Declaration of Taking, in June, 1947, and thereafter. For that reason, therefore, his valuation should be modified to take into consideration the lack of rights in and to these so-called "options acres." Dr. Creager did testify that he took into consideration the fact that Twin City might have to pay more than the considerations called for in the options, in order to exercise same, but he considered that Twin City still had the right to acquire these acres under the so-called option contracts, with which we cannot agree.

Therefore, it is our opinion that, in order to have the potentially integrated power site necessary to establish the dam with the 60-foot head, Twin City would have had to acquire an additional 745.58 acres of land, and the only sound way to compute the cost of such acquisition, from the evidence, is to take Dr. Creager's figure of Four Hundred Sixty (\$460.00) Dollars per acre. On that basis, the valuation given by Dr. Creager should be decreased by Three Hundred Forty-Two Thousand Nine Hundred Sixty-six and 80/100 (\$342,966.80) Dollars, the cost of acquiring the lands which comprised the so-called "options acres," which leaves the lands of Twin City with a sound market value, for

water power purposes, of One Million Two Hundred Fifty-seven Thousand Thirty-three and 20/100 (\$1,-257,033.20) Dollars.

The payment of that amount for the property taken from Twin City in these actions will, in our opinion, be just compensation, both from the viewpoint of the condemnor and of the condemnee.

**Direct Testimony of the Valuation Witnesses
in the Twin City Litigation**

MR. WILLIAM P. CREAGER, sworn for the Twin City Power Company, Testified as follows.

DIRECT EXAMINATION

By Mr. ROBINSON:

Q. Mr. Creager, for the record, will you give us your name and present address?

A. My name is William Pitcher Creager, and I reside at Buffalo, New York.

Q. And your present age, Dr. Creager?

A. 73 years old.

Q. What is your occupation?

A. Consulting Hydraulic Engineer.

Q. What has been your education?

A. I was graduated from Rensselaer Polytechnic Institute in 1901 with the degree of Civil Engineer.

Q. Do you have any honorary degrees?

A. Yes, the Rensselaer Polytechnic Institute gave me an honorary degree of Doctor of Engineering. It also elected me a member of the honorary society of the Sigma Xi.

Q. Are you also a member of the American Society of Civil Engineers?

A. Yes, sir.

Q. You are an honorary member of that organization?

A. Yes, sir.

Q. What has been your engineering experience?

A. Fifty-two years as a hydraulic engineer.

Q. Will you give us some of the details?

A. For about three years I was in the Phillippine Islands in an engineering capacity mostly in conjunction with control of river and other work.

For two years I was with the New York State Barge Canal on design of locks and dams.

For sixteen years I was with the J. G. White Engineering Corporation of New York City on designs and valuations of hydro-electric projects. I started out as Designer to the Chief Engineer of Hydraulic Structures.

For eight years I was Vice President and Chief Engineer of the Power Corporation of New York and the Northern New York Utilities, located in Watertown, New York, now a part of the Niagara Mohawk Power Corporation, where I was in charge of engineering and construction of hydro-electric power plants and the valuation of hydro-electric power plants and storage reservoir sites.

For the past twenty-two years I have been consulting — hydraulic engineer on designs, construction and valuation of hydraulic properties.

Q. Tell us briefly what has been the nature of your experience.

A. I have worked on 132 dams. I have designed 36 of them; constructed 10 of them; consultation on design 96; consultation on construction 30.

With regard to hydro-electric power developments, I have designed 36 of them; constructed 14; consultation on design or construction 20, and reports on valuation 162.

I have been consultant on 58 flood control projects.

Q. In how many of our states, Dr. Creager, have your work carried you? In how many different states have you been engaged in this work?

A. It has carried me into 35 states.

Q. And into how many foreign countries?

A. Into 13 foreign countries.

Q. And you stated, I believe, that you had made 162 reports on valuations. Will you describe for us the nature of these valuations?

A. Yes, sir; All of these valuations included studies of water supply, cost of development, if not already developed, power available, transmission, market for power and all other pertinent items. They were, however, of several different types.

1. Valuations for land owners, to report on the value of their lands as water power sites.

2. Valuations for bankers, to report on the value of water power sites offered for sale.

3. Value of properties of one company taken over by another.

4. Studies to determine relative value of several owned sites to supply growing markets.

5. Valuation for tax purposes.

6. Valuations for rate making.

The first three of these items, namely, valuations for land owners, bankers and power companies, predominated in my experience and covered the entire subject including recommended reasonable purchase price.

Q. Were any of these properties purchased at the price which you recommended?

A. Yes, sir, about 1/3 of them, I should say.

Q. Have you ever testified before in technical cases, Doctor?

A. Yes.

Q. How many times?

A. 22 times.

Q. Did any of these cases have to do with hydro-electric sites?

A. They did.

Q. Will you tell us some of them?

A. *Land Owners v. U. S. Government* on value of site of the Grand Coulee Dam.

Southern States Power Company v. TVA on value of properties on Hiwassee River.

Tennessee Electric Company and others. I believe they called this "*Eighteen Companies*" v. TVA on the general TVA situation.

Niagara Falls Park and River Railway Company v. Canadian Government — Value of hydro-electric plant at Niagara Falls.

Grand River Hydro, in Oklahoma, v. Grand River Dam Authority — Valuation of site.

Montana Power Company v. Irrigation Users — Water rights and value of developments to community.

Roundout Paper Company v. City of New York. Value of site destroyed.

Q. Name some of the valuations you made on hydro-electric cases, on which you were engaged, and which were settled before going to trial.

A. *T.V.A. v. Hiwassee-Nolichucky Power Company; Daniels Company v. City of Baltimore; Georgia Power Company v. U. S. Government* — I believe that is all.

Q. Will you give us the names of some of your representative clients during your 22 years of consulting practice?

A. The Niagara Mohawk Power Corporation; The Aluminum Company of America; The Tennessee Valley Authority; Office of Production Management; Chief of Engineers, U. S. Army and a number of his district and division engineers; Los Angeles County Flood Control District; Ebasco Services, New York City; Governments of Mexico, Russia, Turkey and Portugal, and a large number of public utilities.

Q. Are you engaged as consultant on the St. Lawrence project and the New Niagara Falls Project?

A. Yes, sir.

Q. Have you been the author of any books on engineering?

A. Yes, sir.

Q. Tell us about them.

A. Author or co-author of three engineering books on hydro-electric developments and dams, and contributor of chapters on those subjects for seven others.

Q. Have you written any engineering articles?

A. Yes, sir; I have written a very large number of articles for engineering magazines and papers for engineering societies.

Q. Of what national engineering societies are you a member?

A. American Society of Civil Engineers; American Institute of Consulting Engineers; American Geophysical Union; International Association for Hydraulic Research; International Association for Soil Mechanics Research; International Committee on Large Dams.

Q. Have you been active in any of these societies?

A. Yes, sir.

Q. All right, give us that.

A. Principally in the American Society of Civil Engineers. For 10 years I have been a member of the Executive Committee of the Power Division and Chairman for three years. For six years I was a member of the Executive Committee of the Soil Mechanics and Foundation Division. I have been a chairman or member of a number of Committees for the National Society, including at present the Committee on Valuation of Power Plants, Design of Dams, and etc.

Q. Doctor Creager, are you listed in any of the "Who's Who"?

A. Yes, 13 of them.

Q. Are you familiar with the power situation in this part of the United States?

A. Yes, sir.

Q. Have you ever done any work on hydro-electric plants in this part of the country?

A. Yes, sir.

Q. Will you name some of them?

A. Consultation on Glenville, North Carolina; Consultation on Nantahala, North Carolina; Consultation on Fontana project, North Carolina; Design of Ocoee No. 1; Design of Ocoee No. 2; Design of Macon, Georgia; Design of Stevens Creek, near Augusta, Georgia; Design of Parr Shoals, near Parr, South Carolina; Design of Great Falls, near Rock Island, Tennessee; Valuation of Coosa River Project in Alabama; Valuation of Roanoke project in North Carolina; Valuation of Congaree project in South Carolina; Valuation of Saluda River Project in South Carolina; Valuation of Dial Project in Tennessee; Valuation of Powelson Project in North Carolina; and Valuation of Appalachian Project in North Carolina.

Q. Now, Doctor, getting down to the case at hand; are you familiar with the lands lying in the bed and on both sides of the Savannah River, required for an economic development of hydroelectric power on that river, with a dam and powerhouse located near Price's Island?

A. Yes, I studied the map that you presented for identification.

Q. Are you familiar with the lands of the Twin City Power Company in this action?

A. Yes. They are also shown on those exhibits.

Q. Have these lands a peculiar adaptability for water power development?

A. Yes.

Q. Are you familiar with the lands not owned by the Twin City Power Company in this action, which are also required for such development?

A. Yes, sir. They are also shown on those Exhibits.

* * *

Q. Dr. Creager, have you an opinion satisfactory to yourself as to the fair market value of the lands of the Twin City Power Company required for the development of water power at Price's Island as of June 19th or June 23, 1947, prior to the condemnation proceedings, if sold by one who was willing but not compelled to sell and bought by one who was willing to buy but not compelled to buy?

Commissioner McFADDEN: Subject to the objection, go ahead and answer the question.

A. I have made an opinion, based upon studies of my own, on testimony which is in, and which I understand will be placed in evidence, and on information that I have received from those, received from others which I consider reliable.

Mr. MILLER: Just a minute; we renew our objections, as to value coming out, on all grounds, and we think before the value comes out now that the witness should state and we should have the matters be considered and what he based this opinion on, the facts he received and other information from various and sundry

sources. We think, before the value comes out, that we should have the sources and data that he considered.

Commissioner McFADDEN: We have ruled that he may go ahead and answer the question and we will get to his basis and data later.

Q. What, in your opinion, was that fair market value?

A. \$1,600,000.00

Q. Does this value represent the value of all of the Twin City lands?

A. No, sir.

* * *

By Mr. ROBINSON:

Q. Dr. Creager, when we recessed last evening, I believe you had just given us your opinion of the fair market value of the Twin City Holdings at a \$1,600,000.00?

A. Yes, sir.

Q. In your studies of the value of the Twin City properties for power purposes, did you collaborate with other engineers in your studies?

A. Yes, sir.

Q. Whom?

A. Mr. Johnson and Mr. Courtney.

Q. Both of whom are expected to testify in this case?

A. I understand so.

Q. Now, did each of you do a portion of the work that makes up the study of it?

A. Part of it. Each of us did a portion of it, and the rest of it we collaborated.

Q. Did the portion of the work done by Mr. Johnson and Mr. Courtney you check yourself?

A. I checked it, not absolutely to the last figure, but I looked it over and it appeared very reasonable.

Q. Now, Mr. Creager, in arriving at this fair market value of the Twin City Lands being taken by the government, required for the development at this site, what factors did you take into consideration?

Mr. MILLER: May it please your Honors; I want it understood that I am not going to make any objection at this time to any of this, but I would like to have it understood that all grounds of my objection may be reserved and made at the end of the direct examination.

Mr. ROBINSON: That is entirely satisfactory unless it is with reference to the form of the question, or something of that character, which I could cure at the time.

Q. Go ahead, Mr. Creager.

A. When a piece of useful property is taken away from the owner he has lost something of value, and he should receive adequate compensation. This value can be measured in several ways. The most prominent being by his fair market value. The legal definition of the fair market value of the property, as I understand, and as I use it, is the price which a prudent, competent and well informed buyer, who is willing, but not compelled to buy, would pay to a prudent, competent and well informed owner, who is willing, but

not compelled to sell, both the buyer and the seller would take into consideration all the attendant and surrounding conditions and circumstances which affect the market value. These attendant and surrounding conditions and circumstances involve various factors. Never precisely alike in different cases. They very often cannot be reduced precisely to dollars and cents, but their effect is reflected in prices which had been paid under similar conditions for such properties.

Lands having a peculiar adaptability for water power use are of the nature of real estate and ultimately the fair market is necessarily determined by judgment on the part of the experienced and competent valuator, taking into account his past experience, and all the facts and factors affecting the particular property undergoing valuation.

Among the attendant and surrounding conditions and circumstances, which affect the fair market value of the respondent's properties, which have a peculiar adaptability for water power are:

1. Power and energy available at site.
2. Required capital outlay for the hydro installation, exclusive of the price for the estimated value of the property in question.
3. Required capital outlay for producing the equivalent of the hydro out-put from the next best source, assumed by me as from a steam plant.
4. Trends of construction costs of hydro and steam plants. It is my belief that costs of prevailing steam

plants was at that time increasing more rapidly than that for hydro.

5. Annual cost of producing the hydro.

6. Annual cost of production of equivalent steam out-put in steam plants.

7. Trend of annual cost. Having been installed most of the hydro annual cost is fixed for the future, but a large part of the steam cost change with the changing cost of labor and fuel. Indications are that the cost of these items would have increased in the future, giving a distinct advantage to the use of hydro.

8. The annual savings in the use of hydro as compared with steam.

9. The theoretical price which a willing buyer could pay for the company's properties and produce hydro power as cheap as that from steam.

10. Obtaining the necessary lands not owned by the Company.

11. Relative reliability and utility of hydro as compared with steam.

It is generally recognized that hydro plants have greater reliability and utility than steam plants. Some authorities say that hydro capacity should be compared with steam plant capacity which is ten per cent larger.

I have compared them on an even basis but have used the greater reliability of hydro as an intangible asset. Economic operation of electric generation system as supplied by steam plants can be aided greatly by hydro-plants with pondage because it supplies additional power capacity on extremely short notice to

meet unforeseen load demands. There are peculiar loads, or particular loads, to be carried by a steam plant for that plant to operate at the best heat rate, and thus produce energy with a minimum use of coal per unit out-put, and the use of hydro will allow the steam plant to do this. Due to their quick response hydro plants can take momentary load variations due to changes and demand, tie line switching operations and so forth, which a steam plant cannot do. Modern high pressure, high temperature steam plants are limited in the rate in which they can pick up loads. Hydro-plants can pick up loads at the rate of ten seconds for their total capacity. These advantages of hydro over steam cannot be valued in dollars and cents, but must be taken into consideration.

12. Possible competition; with the growing market there is no other hydro competition.

13. Future benefit to the site by possible future storage above the site.

The Duke Power Company's Calhoun Falls, or Middleton Project, or the Government's Hartwell Project would, if built, provide sufficient storage to materially increase dependable out-put of Price's Island.

14. Location and Character and rate of growth of market for power.

15. Legal and political aspects.

There are no legal or political aspects of which I am aware, which would lessen the value of the site.

16. Construction hazards for the hydro. The site is

reported to be ideal for the safe and efficient construction of the project.

17. Relative time required for development of the hydro site as compared with that required of the steam plant. Hydro takes about a year longer to build.

18. Length of required transmission lines. In this case, about five or six miles.

19. Possibility of combining these lands with other lands for water power development lower down on the river of the same or higher elevation of the reservoir flowage.

Q. Now, those are the factors, Dr. Creager, which you considered in arriving at your valuation in this case?

A. Yes, sir. I don't know as I have got them all, but I think I have got it pretty well covered.

Q. You had quite a list. Now, in making your appraisal of this undeveloped site, do you understand that the Twin City Power Company did not, at the time of taking, have a license from the Federal Power Commission, to construct a project on this site?

A. Yes, sir.

Q. In making your appraisal, did you understand that about 530 acres of land, needed to develop this site at an elevation of 283, was covered by agreements in favor of the Twin City Power Company or the Twin City Power Company of Georgia, which obligated Twin City Power Company to pay a price of \$20.00 per acre at the time of the development, and that this amount would have to be paid to the land owners at the time of the development?

A. Yes, sir.

Mr. MILLER: I want to object to that, and I want my objections preserved for the ruling of the court.

Commissioner McFADDEN: Note the objection, Mr. Reporter.

Q. Did you also give weight to the fact that some of these options were some 40 years old, and that the land owners would, or might insist on some higher value for this option property?

A. Yes, sir.

* * *

MR. R. C. JOHNSON, Sworn for the Defendant, Twin City Power Company, Testified as follows.

DIRECT EXAMINATION

By Mr. ROBINSON:

Q. Mr. Johnson, what is your full name and address?

A. Ruben Cumby Johnson, Columbia, South Carolina.

Q. What is your educational background, Mr. Johnson?

A. I graduated with a Degree in Bachelor of Science, Civil Engineer, in 1924, at Rice Institute, Houston, Texas, with subsequent graduate work in water power engineering at the University of Wisconsin.

Q. Tell us something of your experience in the Engineering field?

A. I was two years with United Engineers in Philadelphia, working on hydro-electric and steam plants, mostly hydro, including the Rocky River Development. I was at one time Professional—

The REPORTER: What was that ? Speak louder, please.

The WITNESS: I was at one time professor of Civil Engineering at the University, and for a number of years taught civil engineering, and among the courses was water power engineering and hydraulics.

Q. What University was that ?

A. University of South Carolina, Excuse me.

Q. All right.

A. I was at one time Assistant Professor of Hydraulic Engineering at the University of Tennessee.

During the World War II was instructor and head of the course in hydraulics at the United States Military Academy, West Point.

In 1928, I was with the Duke Power Company on the design of its River Bend Steam Plant.

In 1931, I was with the W. S. Lee Engineering Corporation of Charlotte on the design of the Beauharnois-St. Lawrence River Hydro plant.

In 1936, I was with the TVA as Assistant Hydraulic Engineer on the design of the Chickamaga Dam.

In 1938 to 1941 I was Consultant for Harza Engineering Company on several phases of the Santee-Cooper Hydro-electric Project, and in 1941 with the Harza Engineering Co. I was on the estimate of the cost of the hydro plant for the St. Lawrence River Barnhart Island Project.

Since that time, since 1946 I have been in general consultant work in the civil engineering field. I have skipped things that did not apply to this particular field of activity.

Q. Mr. Johnson, are you a member of any Societies?

A. Yes.

Q. Will you name some, please?

A. I am a Member of the American Society of Civil Engineers and have been a full member since 1935. I am also a life member of the American Concrete Institute.

Q. You are a registered Professional Engineer?

A. Yes, the State of South Carolina, State of Georgia, State of New York, and the National Board of Engineering Examiners.

Q. And I believe your business office is in Columbia, South Carolina?

A. At the present time, yes.

Q. Mr. Johnson, did you prepare certain of these exhibits, which we have offered for identification in this case?

A. A number of them were prepared under my directions, and some of them by me personally.

* * *

Q. Now, Mr. Johnson, did you also prepare some cost comparisons between (Exhibit 40) certain hydro-electric projects that have previously been constructed?

A. Yes, sir. I worked up a tabulation of some comparisons with other plants that appeared to be comparable.

Q. Now, will you give us the source of your information as contained on Exhibit 40?

A. If you will refer to Exhibit 40, all these plants are for the Santee River System because it compares more nearly to the Savannah River System.

Q. Is that the largest river for some distance north of Savannah on the Atlantic Seaboard?

A. Yes, the Santee is the largest in this area.

Q. Located in North and South Carolina?

A. Yes. The drainage area and the head —

Mr. MILLER: Before we go into this, I think it should be offered in evidence and I would like to object. As I understood the question, the question was asked previously as to the source of this information, and as I understand those sources are shown on page 2 of the exhibit.

Mr. ROBINSON: That's correct.

The WITNESS: That is correct. I believe that covers all the sources.

Mr. MILLER: Now, with respect to this exhibit, we stipulate, subject to the right to check, that the figures may be used in the same manner and to the same extent as though the original source of the figures recited were in the witness' hands. This exhibit, however, we object to it until it is made competent by evidence by the evidence of some witness who can explain and add to it in accordance with the purpose for which it was made maybe tendered, because from the information given on the exhibit itself the exhibit would not be competent or material or probative to any issue involved in this cause.

Mr. ROBINSON: We offer it subject to his objections.

Commissioner McFADDEN: All right, it is introduced in evidence, marked Exhibit 40, subject to the stipulation as to the correctness and also subject to the

objections as to its competency being established by subsequent testimony.

Q. Now, Mr. Johnson, I want to ask you some questions about the exhibit. The first eight plants on the exhibit are plants of the Duke Power Company?

A. Yes, that's right.

Q. And the Buzzard Roost plant, I believe, is owned by Greenwood County?

A. Correct.

Q. And the Saluda plant by the South Carolina Electric & Gas Company?

A. That's correct.

Q. And the Santee-Cooper by the South Carolina Public Service Authority.

A. Yes, sir, that's correct.

Q. And they all are on the Santee River System, I believe you said?

A. Yes, sir.

Q. And in the second column you have put the date of construction, have you not?

A. Yes, sir, that's correct.

Q. Is that the date of the completion? I am not sure?

A. That is normally the year they went into operation.

Q. Now, in the next column you have placed, I believe the drainage area?

A. Yes, sir.

Q. In square miles?

A. Yes.

Q. And in the next column the head of the plant?

A. Yes, sir.

Q. And then the installed capacity in kilowatts, I believe?

A. Yes, sir.

Q. And the next is the total cost of the project?

A. Correct.

Q. And the next column is the cost of the land and land rights?

A. Yes, sir.

Q. And the next column is the average annual number of kilowatt hours in thousands generated at each of these plants?

A. Yes, that is correct, except in the case of Santee-Cooper. Instead of being a ten year average, there is an average, since the plant went into operation, which was less than ten years, about eight years, I believe I made a note of that somewhere.

Q. Now, the information contained in those columns is information you obtained from the sources indicated on page 2?

A. Yes, sir.

Q. Now, the last three columns are mathematical computations from that information?

A. Yes, which I made.

Q. Have you calculated the annual land cost per kilowatt installed capacity for these eleven plants?

A. Yes, sir.

Q. What does that amount to?

Mr. MILLER: Now, we object to that on the same grounds. The evidence produced so far as to the cost

of installed capacity, or any of these figures — I don't know the purpose of it, but as it now stands it could not be offered to any issue that is involved in this case, or that could be involved in this case.

Commissioner McFADDEN: It is admitted in evidence subject to that objection.

Q. What is that land cost per kilowatt installed capacity?

A. The land cost for the eleven plants averages \$44.30 per kilowatt installed capacity.

* * *

Q. Assuming a 50,000 kilowatt installed capacity, and assuming that the land cost would be on the same basis as the average of these eleven plants, what would the land cost be?

* * *

Commissioner McFADDEN: The objection is overruled, and it is admitted, subject to the objections heretofore stated.

* * *

Q. Go ahead, Mr. Johnson.

A. \$2,200,000.00

Q. On the same basis, if you use 68,000 kilowatt installed capacity, what would be the land cost?

A. \$3,000,000.00, in round numbers.

Q. Now, Mr. Johnson, will you take the next column, which is headed "Land cost per thousand annual kilowatt hours."

A. That is land cost for energy.

Q. And that averages what?

A. \$14.20, or \$14.00 in round numbers per thousand kilowatt hours.

Q. Now, my recollection this morning was that Mr. Creager estimated the energy out-put on a 60 foot dam at 200,000,000 kilowatt hours, is that correct?

A. That's correct.

Q. Is that also your estimate?

A. Also my estimate.

Q. Will you make computations on that basis and tell us what the land cost per thousand kilowatt hours would be?

A. \$2,800,000.00 would be the land cost for 200,000,000 kilowatt hours annually.

Q. Now of course, that would include all the land cost to date and not merely that owned by the Twin City Power Company?

A. Yes, that's correct, that includes the entire land cost on comparable basis.

Q. What is your third column?

A. The third column is the ratio of land cost to total cost for these plants.

Q. That works out at what percent?

A. It works out at 19.9 percent for the average.

Q. Assuming that is 20 percent and applying to the cost of a proposed development as developed in Mr. Creager's Cross Examination, which I believe for a 60 foot dam was \$14,630,000.00?

A. Nineteen point-nine percent of that would be around \$2,800,000.00, that is in round numbers

Q. If you applied it to the 70 foot dam cost of \$16,698,000.00, what would that be?

A. \$3,300,000.00.

Q. And if you applied it to the \$18,650,000.00 for the 80 foot dam, what would it be?

A. It would be \$3,700,000.00.

Q. Now, Mr. Johnson, are you familiar with the lands of the Twin City Power Company in this action which are being condemned by the government in this action?

A. Yes, sir.

Q. Those are the lands which have been shown on the deed book and on the maps which are in evidence?

A. Yes, sir.

* * *

RE-DIRECT EXAMINATION

By Mr. ROBINSON:

Q. Mr. Johnson, what, in your opinion, was the fair market value of these Twin City properties at the time they were condemned by the government in June, 1947, or a period subsequent to that date?

A. In my opinion the fair market value was the very minimum sum of a million and a half dollars.

Q. Now, in arriving at this fair market value, Mr. Johnson, do you agree with Dr. Creager as to the factors which are to be considered in determining the market value of the undeveloped water site?

A. Yes, sir, I agree with him, with the additional, I might say, this site is particularly free of any obstructions to the construction of a hydro plant.

Q. Just what do you mean by that?

A. Well, it is in a section of the country where you have all the favorable physical factors that you could hope to find, lack of railroads, lack of roads, lack of villages, lack of farm houses, lack of telephone lines and transmission lines to be removed.

Q. You don't have any cost attributed to the moving of utilities?

A. That's correct.

Q. Is it frequently the case in hydro sites, in developing sites, that railroads have to be moved considerably?

A. Yes, sir, they very frequently have to be moved at considerable expense, or bridges raised at considerable expense.

Q. Is that due largely to the fact that railroads frequently follow rivers and valleys?

A. They followed the contour, more or less, to save cutting and grading and things like that in the old days.

Q. Are any two water power sites absolutely comparable?

A. No, sir. I don't think you could find two in the whole world exactly alike.

Q. In addition to the matter of the absence of roads and railroads, what would you say were other favorable factors in connection with this Twin City Price Island site?

A. Well, its nearness to market, nearness to transmission. The time element, of course, was favorable at the time of taking. The general economical growth and power demand of this section of the country. The

shifting population tending to create additional demand. The physical features at the site. The ease in which the spillway could be built without undue excavation. The ease with which the dam could be constructed without undue expense, and the sharp drop in the bank of the stream on each side and the proper width practically. All of those factors add to the desirability of this particular site.

Q. Is the site capable of being developed at various heads, Mr. Johnson?

A. Yes, sir, you run it up for three, or even four different heads at intervals of ten feet you would not run into any difficulty whatever.

Q. What would those heads be?

A. 60, 70, 80 or even 90 feet, and if you go to 100 feet you may have to raise the bridge, but that would be all.

Q. A 100 feet, I believe, would reach approximately the tail waters of the Duke Power Company's Calhoun dam site, would it not?

A. Yes, sir, approximately.

Q. I believe that is an elevation of about 300?

A. Yes, sir.

Q. But a pool elevation up to an elevation of about 300 feet say would not experience any substantial cost in moving any roads, railroads and utilities?

A. That's correct, yes.

Q. In your opinion, Mr. Johnson, are the Twin City properties also useful in connection with the development of a project down stream from Price's Island?

A. Yes, sir, decidedly so at any of several locations. As a matter of fact, it is being used for that, as I understand, in the Clark Hill Project.

Q. Was that also the plan of the Savannah River Electric Company when it had a license in 1928 to build below and flood out the Twin City properties?

A. Yes, sir. I don't think the heads were identical, but they were substantially the same.

Q. Has the load of the utility systems in this area increased? Would the value of the development at Price's Island increase?

A. Yes, sir, decidedly. A plant of that type would be most advantageous to use on another system as the peaking plant, and if you recall the nature of the load curves from one of the exhibits you will recall that there were a number of peaks. As the steam generation increased, and more and more of that peak could be taken by another load from a hydro-electric plant, therefore, the economical advantage would be increased.

Q. Is this the exhibit you referred to? (handing exhibit to witness).

A. Yes.

Q. And did you compute the acreage that the Twin City would have to acquire to build to elevation 263 and 273 and 283?

A. Yes, sir.

Q. How did you do that?

A. We used the government supplied maps, the contours as being correct, the acreage, where they had them, and we checked them and in most cases found

that they were substantially correct, and we used those; and for the rest of it we used a planimeter and took off the areas by a planimeter, the areas outlined on D.S.R. 153 and 103, and also exhibit No. 24.

Q. Will you give us those acreages for each contour elevation?

Mr. MILLER: Now, I don't object to that if they will include the properties owned by the Twin City and what they control, options, flowage and all of that.

Q. In giving us the amount that the Twin City would have to acquire, are you considering that Twin City would not have to acquire the lands it owns in fee, the lands over which it has flowage rights and so-called options?

A. Yes, sir, That's correct.

Q. You are also considering that the Twin City would not have to acquire from anyone as to the bed of the stream?

A. That is correct. Now, you are speaking about a 60 foot dam, the area that would have to be acquired in order to develop it as a power site for a 60 foot dam?

Q. Yes.

A. 400 acres for a 60 foot dam would have to be acquired.

Q. All right, 70 foot dam?

A. 1250 acres.

Q. An 80 foot dam?

A. About 1850 acres — I beg your pardon, 2850 acres.

Q. Now, Mr. Johnson, you gave us a figure of 170 acres earlier today in commenting on the red portion on Exhibit No. 26, what is the difference between that computation and the 400 acres you gave for the 60 foot dam?

A. A 170 acres will carry the power pool to an elevation of 263. If you establish your power pool to elevation 263 you would still have to have more land above that elevation.

Q. And that represents a difference of —

A. — a difference between 170 acres and 400.

Q. Now, Mr. Johnson, in making your appraisal of a million and a half dollars as the market value of this site, did you understand that the Twin City Power Company did not, at the time of the condemnation, have a license from the Federal Power Commission?

A. Yes, sir, I understand that.

Q. Did you also understand that some 530 of these acres up to elevation 283 were under an agreement in favor of Twin City Power Company and Twin City Power Company of Georgia which were of some age and which the land owner might insist on some higher value?

A. Yes, sir.

Q. You took that factor into consideration?

A. Yes, sir.

* * *

By Mr. ROBINSON:

Q. Mr. Johnson, by examining you with reference to Exhibit 40, prior to giving your opinion, I am afraid

I may have created an erroneous understanding as to whether your opinion as to value of the Twin City Holdings was based on the comparisons shown on Exhibit 40. I would like for you to explain whether or not your opinion was so based?

A. No, sir, my opinion is not based on that comparison. That comparison was used as a check to see whether or not a price of that nature would be in line with the market value as gone before, and was found that the price as finally determined was somewhere in the neighborhood of over half of what had been paid before on these projects.

Mr. ROBINSON: The witness is with you.

* * *

MR. NEVILLE C. COURTNEY, Was next called as a witness for the Twin City Power Company, et al., and after having been first duly sworn, the truth, the whole truth and nothing but the truth to tell, testified as follows.

DIRECT EXAMINATION

By Mr. ROBINSON:

Q. Now, Mr. Courtney, will you give us your address and occupation?

A. I live in Brooklawn, New Jersey, Occupation, Consulting Hydro-electric Engineer.

Q. And your age?

A. 59.

Q. What is your educational background?

A. I completed two years at The Johns Hopkins University in Civil Engineering.

Q. What has been your experience?

A. I have had 38 years of general civil engineering practice, of which a little over 20 years has been in the hydro-electric or hydraulic engineering field. The first 11 years of my experience I was with mainly minor sub-professional positions that one usually holds. But beginning with the U.G.I. Contracting Company of Philadelphia, Pennsylvania, I spent eight years there with that company and its successors, The United Engineers Constructors, and mostly on hydraulic engineering work. The type of plant that I worked on there, I was Assistant Engineer, under the engineer in charge of all the hydro-electric work, was at Baldwinsville, New York, where we put in a conditional unit, generator —

Q. — was that steam or hydro?

A. That was hydro. I worked on the Rocky River Hydro-electric Pumped Storage Plant in Connecticut, which was quite a substantial development, a special development in the hydro-electric field. I worked on and helped develop under the supervision of the Chief Engineer of the Gorge Hydro-electric Plant in Vermont, and a number of other minor projects in the hydro-electric field, such as investigations from a contractor's standpoint of the building of the Safe Harbor hydro-electric development on the Susquehanna River. We did not design the job but they were large contractors and we developed what we thought to be the proper method of approach for construction.

Q. During that period, under whose supervision were you?

A. Under the supervision of Mr. Joel D. Justin. Part of the time while I was with those two companies I worked on the design of steam power plants. The last fifteen years of my hydro-electric and hydraulic experience was with Mr. Joel D. Justin, as an associate, or as a partner. During my period with him we built a plant for the Dickey Hydro-Electric Company, for the Dickey firm, built them a hydro-electric plant. We were consultants for the Philadelphia Electric Company, where we did practically all of their hydraulic work dealing with hydro-electric power on the Conowingo Plant on the Susquehanna River.

Q. Is that Conowingo one of the largest plants in the country?

A. It is.

Q. What is the approximately installed capacity?

A. 250,000 kilowatts. We made such studies as putting in additional units and so forth. We made a report on the water supply for the city area of Philadelphia, not hydro-electric, but for the purpose of finding what was the most advisable point to secure water for the City of Philadelphia from the mountains up in New York State, or from other high points in Pennsylvania.

We designed a plant down at Millville, New Jersey, for an intake structure to a hydro-electric unit. There were a number of other jobs of such nature of designing and building dams in which we acted many times for contractors as engineers. For instance on the

Quabbin Dam in Massachusetts, we worked with the Contractor to make up designs for the hog box and wood dredges to go on the pool for constructing that earth dam.

Under the firm of Justin & Courtney, I became associated with Mr. Justin, we worked on a number of projects, also including those after his death, and incidentally his son and I have continued the partnership since. We worked on the large storage reservoir for the Pacific Gas & Electric Company out in California as a method of getting additional storage for all the hydro-electric units on the Big Feather River. Since his death I have continued that work with the Pacific Gas. I designed an earth dam for the City of Chester in southwest Pennsylvania with four other engineers in the City of Philadelphia which was used as a water supply project. It involved an earth dam with taintor gates.

We designed a job for Camden County, New Jersey, for a special type of project in which we built a dam to permit the polluted waters of the Delaware River from proceeding up stream by having gates to let the waters move up so that the waters up stream would always be fresh and be suitable for recreation and bathing and fishing and so forth.

We designed two dams for the township of Morristown, New Jersey, in which the upstream part was used for recreational purposes and not power purposes.

We were engineers on the Schuylkill River Project in Pennsylvania, which was a \$30,000,000.00 project, in

which our partnership was to design all the permanent dams that was necessary on that project for the purpose of de-silting or catching the silt that came down from the coal mines so that we could pump it by dredges from those reservoirs and put it upon high ground in the adjacent sections of the river. That work was continued for about two years and a half after Mr. Justin's death, and we have completed all those dams in that time. There are a number of other minor, quite a number of other minor projects, but I have simply given you the major ones.

In this section of the country, I might say, there are four projects that we did quite extensive work on. One of them was the Saluda dam, not the original dam. We did not get in on that until about 1941 when we were employed by the Engineers of the South Carolina Gas & Electric Company, and we designed — I made the flood calculations under Mr. Justin's supervision. I made a study of the rainfall, the advisability of installing additional spillway capacity at that dam, and also we designed a method of strengthening the dam by taking the rock from the spillway excavation and placing it on the down stream slope to make the dam still more stable, and by that result permitting the height of the water in the Saluda reservoir to be raised and thereby securing more capacity for that particular electric company.

About five years later, on the same project, or the same general project, we made additional studies in connection with Gilbert Associates of Reading, Pa., for

a low head project immediately down stream from the big Saluda dam for the purpose of securing additional energy and capacity, particularly with respect to securing a license from the Federal Power Commission.

We were the engineers, hired by the local engineers, on the Buzzard's Roost Hydro Project, above the Saluda Project, where we did some work for them on the design of the stilling basin and retaining walls of the dam.

I worked with the firm of Albright & Friel of Philadelphia to determine the advisable source of water supply for the City of Winston-Salem in North Carolina. They were the Sanitary Water Supply Engineers for that firm, and I was employed as a consultant from that standpoint.

Q. Have you done any work in connection with valuation of projects?

A. While the Grand Hydro, or just before the Grand Hydro case was brought before the courts, I worked under the supervision of Mr. Joel D. Justin for a number of months in assisting him in determining the value, or what we thought was the value of the Grand River Hydro Project, known as Pensacola also, near Vinita, Oklahoma.

We were also employed by the Tennessee Valley Authority in connection with the Powelson case to determine the value of four projects in Southeastern Tennessee, or Northwestern North Carolina for report to them as to what we thought the value of that prop-

erty was. We made that report, but neither Mr. Justin nor I were called upon to testify in the case.

In the recent past the firm of Justin & Courtney have had occasion to determine the valuation of certain losses to the hydro-electric plants, which the Senior Mr. Joel D. Justin and I designed in 1937 for the Dickey plant in Maryland. We were acting for the Dickey people and made our report to the Dickey people, and the results of our report were accepted by the City of Baltimore without the annual loss, I should say, was accepted by the City of Baltimore as a basis of settlement which the city has agreed to.

Q. Now, Mr. Courtney, in approaching a study of the Twin City Power Company, the Price Island proposed development and dam site and lands here, what material have you had available for your study?

A. I had available the various, what is generally known, as the 308 reports. I had the opportunity to look at the Definite Project Report on the Clark Hill Project on the Savannah River.

Q. The Clark Hill Project?

A. Yes, the Clark Hill Project. I had the duration curve, which, I understand, was prepared for the monthly duration curve, which was prepared by the Army Engineers on the flow, their calculated flow, at Price's Island. I had the various loads of the power companies, principally, three, the Dukes, The South Carolina and the Southern Companies, or Georgia, as we call it, which I secured from the Federal Power Commission, and I had the benefit of the previous

studies made on the Twin City Project, including such things as the preliminary permit, which was granted by the Federal Power Commission to the Twin City Company. I also had the maps of the various counties that you have heard submitted here yesterday. I had the benefit of looking at the old Amburson drawings that were prepared back — the ones that I saw were prepared in 1909. I think they were prepared first on one head 60, and then later that head was increased to a higher head. I had the benefit of generally other miscellaneous information that was either available in a general way that had been submitted, and other pertinent information that I was able to secure. One particular report was the report of the Southeastern Power Market Survey, made by the Federal Power Commission, and dated in March of 1947, particularly applying to the regions involved in Georgia and South Carolina.

Q. I believe the pertinent portions of that report have been offered in evidence, have they not?

A. I don't think so?

Q. You don't think so?

A. No sir. I merely had reference to it for my studies.

Q. Now, I assume that you also have the general engineering information that is available to engineers on prices and things of that kind?

A. Yes, sir.

Q. Now, in approaching this study of the best development of this site, did you consider a single head, or more than one?

A. I considered more than one head.

Q. What heads did you consider as being an economical development?

A. I considered anything from 60 to 80 or 90 foot head.

Q. Now, in approaching — First, I will ask you: did you find that the Twin City site at Price's Island was suitable for development for water power purposes?

A. Yes, very favorable.

Q. Did you find it favorable at all of these heads that you mentioned?

A. I found that it could be developed at any of those heads. But, if I may add, I find from my calculations so far that the range of the upper head makes the most valuable site for a hydro-electric project.

Q. Are these Twin City properties also useful for water power purposes in connection with a down stream project?

A. Oh, very much so. These properties occupy a very key position in the whole set up, not only from the vertical standpoint at Twin City, but they are a very vital part for any development at any one of the proposed sites that might have been built down stream. I think there were three in total, two of them between Price's Island and Clark Hill, and also Clark Hill.

Q. It is actually a part of the Clark Hill Project?

A. Oh, yes.

Q. Now, you spoke of a vertical position, what do you mean by that?

A. Well, I mean a 60, 70, 80, 90 or even a 100 foot head.

Q. What is the fall of the river between Price's Island and Chamberlain's Ferry, approximately?

A. The fall of the river?

Q. Yes, on the Twin City Properties?

A. You speaking of the fall of the river now?

Q. Yes, on the Twin City's lands?

A. It would run probably 60, 70, 80 or 90 feet.

Q. At Chamberlain's Ferry, beginning at Chamberlain's Ferry, which is approximately the upper end of the Twin City Properties, what would it be?

A. I would say 60 feet. I would have to look at Chamberlain map to verify that, but I think it is approximately 60 feet.

Q. Sixty feet?

A. Yes, sir.

Q. Now, what factors are taken into consideration by you in arriving at the market value of the Twin City Properties involved in this case?

A. The head, and the flow condition, the amount of water that's in the stream, the market in this particular section, how the market is growing and has grown, and the possibility for its continued growth. I would compare that with what we could get from any one of these different heights of development, I would compare that with the next best source of power supply, which would be steam, to see if it was economical to develop it at any height with the purpose of trying

to find somewhere near the optimum height that it should be developed.

Q. Anything else?

A. I would consider whether or not there were any railroads in the valley, or rather it would have a great weight in determining that value. In this particular case there are no railroads whatever running up the valley. There are no bridges, until you reach the bottom of the girder of the bridge at elevation 326.

Q. That is the bridge between Lincolntown, Georgia, and McCormick, South Carolina?

A. That's right. There are no highways to be moved. Of course, there may be a few roads that people go down to fish, but I mean real highways. There are no transmission lines. There is practically no improved property on the site, and there is one big feature that I would consider is the fact that the Twin City people have assembled this land into one enormous block of acreage, in which one owner owns a very, very large percentage of the entire acreage that would be required to make this development. The nearness of the transmission lines is also a factor. About five miles, approximately five miles west of Price's Island is a 110,000 volt line of the Georgia Power Company. The railroads for bringing in the material, generators, turbines and equipment and so forth are extremely close at Modoc, being approximately two miles. The access lands, or lands necessary for the railroad owned by the Twin City Power Company. It even has been graded and made for a road and at one time a road was con-

structed, as I understand. The site gives good storage for development. There is a strong possibility that at sometime in the future that upstream developments would have been constructed, such as the Calhoun Falls, or Hartwell, which the storage in those reservoirs would very materially aid any development at any head at Twin City. I think that generally covers it.

Q. After giving consideration to these factors and studying the lands of the Twin City Power Company, have you formed an opinion as to the fair market value of its lands required for the development of this water power as of June, 1947, prior to the condemnation proceedings, if sold by one who was willing but not compelled to sell, and bought by one who was willing, but not compelled to buy?

A. Yes, sir.

Q. What is that fair market value, Mr. Courtney?

Mr. MILLER: I think it is perfectly apparent that he is using the same factors and the same basis as the witness, Dr. Creager, on yesterday, and my general objection runs to the same line and I make the same objections, of course, and I will reserve all of it until the motion to strike after the cross examination, which I shall urge at that time. I don't believe it is necessary for me to restate it all over again that I am objecting to the power value. I assume that the Court is going to overrule it at this time anyway.

Commissioner McFADDEN: We will admit this evidence, subject to Mr. Miller's general objection, and

all specific objections to similar testimony offered by Dr. Creager and by Mr. Johnson.

Q. What is that value, Mr. Courtney?

A. At least \$1,900,000.00.

Q. In arriving at that value, did you understand that the Twin City Power Company had no Federal Power Commission license?

A. Yes, sir.

Q. Did you understand that in arriving at that value that the Twin City Power Company did not rely upon any power of condemnation?

A. Yes, none whatever.

Q. And did you understand, in arriving at that value, that there was some land necessary for a 60 foot head or a higher head which the Twin City Power Company did not own and did not control?

A. Yes, sir.

Q. In arriving at that value, did you understand —

MR. MILLER: — May it please the Court, I think these witnesses, all of them, are generally qualified, and I want to say that any objection that I have made is not addressed to any general qualification of any of these witnesses who have taken the stand, but I don't think this witness can be cross examined about lands by counsel, about the values, and I object to him asking leading questions.

Commissioner McFADDEN: Yes, those questions are rather leading, Mr. Robinson.

MR. ROBINSON: Well, I will phrase the questions a little different.

Q. Mr. Courtney, in arriving at your conclusion, with reference to the Twin City lands, did you have any information about the type of ownership and control of the Twin City Power Company of these lands?

A. Well, yes, I understood there were some in there with options, possible options.

Q. Did you understand anything with regard to the age of these options?

A. They were quite old, relatively.

Q. In arriving at your value, did you give any consideration to the age of those options?

A. Well, I gave consideration but it didn't affect my price that I arrived at.

Q. Now, would you be in position to compare this hydro-electric site at Price's Island with other undeveloped sites with which you are familiar within the eastern part of the United States?

A. Compare it with other sites?

Q. I will ask you this first, are any two sites absolutely comparable?

A. No, sir.

Q. With reference to favorable or unfavorable conditions, how would you rate this site as compared to other sites with which you are familiar with?

A. I would rate this site as extremely favorable. I don't know as I have ever seen a site where it had so — well there were no railroads, no transmission lines, no highways, no bridges within a reasonable elevation of that development. It is almost perfect from that standpoint. The flow of the river is good. You have

good drainage area. It rises in the Smokey Mountains, and the run off is good, it is about one and forty five hundred second foot per square mile. Everything points to an extra fine development.

Q. Now, you said a few minutes ago that you did some work on Buzzard Roost Project on the Saluda River in South Carolina, which I believe is a 60 foot head, approximately?

A. I do not remember the exact head, but I do know that it is somewhere in that neighborhood.

Q. Is the stream flow there anything like it is at Price's Island?

A. No, sir.

* * *

COST COMPARISONS OF EXISTING HYDRO DEVELOPMENTS

Item No.	Plant, River and Date Built	Drainage Area Sq. Mi. ¹	Head Feet. ¹	KW Cap. ²	Total Cost ²	Cost of Land and Land Rights ²	Annual Energy Thousand KW Hrs. 10 Yr. Aver. (1941-50) ³	Land Cost Per 1,000 Annual KW Hours	Ratio Cost to Total Cost (Per Cent)
1.	Bridgewater, Catawba, N. C. 1919	377	135	20,000	\$ 6,931,000	\$ 1,551,800	51,198	77.50	22.4
2.	Rhodiss, Catawba, N. C. 1925	1,050	60	25,500	2,903,000	1,024,400	57,634	39.10	38.4
3.	Oxford, Catawba, N. C. 1928	1,250	90	36,000	4,567,000	1,911,000	98,197	53.00	41.6
4.	Lookout Shoals, Catawba, N. C. 1915	1,410	78	18,720	1,683,311	186,727	82,838	9.90	11.9
5.	Mt. Island, Catawba, N. C. 1923	1,800	78	60,000	5,110,000	1,169,300	104,105	19.40	22.8
6.	Catawba, Catawba, S. C. 1904	3,085	70	60,000	8,033,370	3,874,275	141,935	64.50	48.2
7.	Fishing Creek, Catawba, S. C. . 1916	3,085	61	30,000	3,142,304	536,227	140,315	17.80	17.0
8.	Waterree, Catawba, S. C. 1919	4,940	78	56,000	6,279,600	1,296,600	226,988	23.10	20.6
Sub-Total 8 Plants Above					38,649,585	11,550,329	903,210	37.70	29.9
Average (weighted) of 8 Plants Above									
9.	Buzzards Roost, Saluda. 1940	1,100	60	15,000	5,130,239	793,854	50,034	52.80	15.4
10.	Saluda, Saluda 1931	2,400	188	130,000	21,508,808	5,605,797	257,419	43.20	26.0
11.	Santee-Cooper, Santee 1942	14,700	70	132,615	65,000,000	7,898,496	606,602	59.50	12.1
Total 11 Plants Above					\$130,288,692	\$25,848,476	1,817,265	44.30	19.9
Average (weighted) of 11 plants above.									

¹ From H.D. 96, 73rd Congress, 1st Session.

² As reported to FPC Form No. 1 (1950, item 1, 2, 3, 5, 8; 1949 item 4, 6, 7, 10; 1952 item 9). Except cost data on Santee-Cooper from S. C. P.S.A.

³ From FPC Form 12, (1941-1950), except item 11, 1943-50.

Pertinent Excerpts from Ex. D-I-144, the Testimony of the Owner's Valuation Witnesses in the Grand Hydro Litigation.

JOEL D. JUSTIN, called on behalf of defendant, Grand Hydro, in chief, after having been duly sworn on oath, on direct examination testified as follows, to wit

* * *

Q. Now, as the result of that contact will you just tell the gentlemen of the jury here what investigation and what work, and what study you did, to determine the value of this dam site over there at Pensacola?

A. Well, I first visited the dam site, which, at that time was in the course of construction, and they had a number of the foundations for the braces open at the time, and I got an excellent view of the foundation conditions there, and I went around the top and observed everything that I could. Then, later in 1940, I came back and I visited the structure again. At that time it was completed, the project completed, and I also saw it from the air, went up the lake and observed the conditions, and I got a pretty good idea of what sort of a project it was, and what the conditions were, and I studied all of the available engineering data that I could get a hold of as to the project, and there was a considerable mass of data that was not very clear, and I got a pretty good line on it.

Q. Now, Mr. Justin, in connection with the engineering report that you refer to, I want to ask you if it is in the province of the United States government, or the chief engineer's office, to publish those studies of the

various streams of the United States — are such publications made by the government.

A. They are made usually for some particular purpose, like the flood control committee, or something like that that they put in the report of the chief engineer as a part of the same document. Of course, in addition to that, there are publications on stream values by the Geographical Survey, and the water supply papers.

Q. Do you remember what purpose, the governmental purpose of the publications on the Grand River was?

A. The purpose I would say, off hand was whether or not the project was feasible.

Q. The water power project?

A. The water power project and flood control, water supply and flood control — water power and flood control.

Q. From your study of those reports, and from your investigation of this dam site, did you consider you were possessed of sufficient information to make an appraisal of its market value?

A. Yes, sir.

Q. Now, so that the jury may visualize the situation, can you tell us, (indicating on map) the line up there shown on this map under the blue line, and the line immediately next to it, the blue line being the axis of the dam, was that physically adaptable as a dam site?

A. It certainly was.

Q. Did your investigation disclose that that land constituting that dam site, had a special value for dam site purposes, or had any such value?

A. It had a value.

Q. Now, will you please tell the jury, Mr. Justin, what consideration, or what fact, caused you to arrive at that conclusion that it did have a special value and an advantageous situation for dam site purposes?

A. I considered the adaptability and the relative advantage of the site, and the values of other sites in comparison of which I am familiar; the available stream flow; the power and energy — those are all items; the storage capacity at the site, the conditions in the territory, and effect of the proposed development, and the feasibility of the projects downstream.

I might explain that: You build one project up to the watershed and you store water there; you utilize that water to make your power, you let that water flow downstream; now, it is being stored, it is stored the way you want it, and it can be used by other plants in the future downstream, plants which may be built in some cases — though, in this instance — in this case, they are not in existence; the adaptability of the project in the installation of additional capacity at a later date.

My experience is that when you have a large reservoir, it is always feasible to use it, because later on when the load rose materially you can put in more capacity, and because hydro capacity is very advantageous for that purpose.

I considered the market conditions covering the utilization of the power and energy which the project might produce, the breakdown interference that might be offered by a steam system, and the advantages of a large reservoir. Now, you have a large reservoir, and in case you have a breakdown in the steam plant in the system, why, you can just pull on that reservoir for waters on hand until your steam plant has been repaired, and they can carry their proper proportion of the load.

Q. Something that would be there if you had a broken transmission line, and the hydro would be in a position to aid in order not to stop service from the steam line?

A. That is true; but, of course, if you had a break in the transmission lines, there isn't really an advantage because the break could be in the hydro.

Q. What I mean is, that the hydro is instantly available to serve what it is hooked up with?

A. That is true, it is instantly available.

Q. Now, Mr. Justin, I might ask you two or three questions about those subjects you mentioned. Did you find the market condition favorable for this dam site development?

A. I did.

Q. Did you find it would have adequate storage to serve that market according to its needs?

A. It was.

Mr. MARSHALL: I think the Authority is going to object to the indefinite sort of questions propounded, and the indefinite sort of answers which the witness gives.

Reference is made to the project, what kind, what size, what capacity is left entirely out of consideration in this testimony. I submit, your Honor, that counsel and the witness ought to be directed to confine his questions, and his answers respectively to a certain definite time, so that we may be able to understand what the effect of the witness' testimony is, and lay a proper predicate for cross-examination.

By Mr. FOWLER:

Q. Now, Mr. Justin —

Mr. MARSHALL: (Interrupting) Exception.

By Mr. FOWLER:

Q. (Continuing) You have made an appraisal of this Pensacola dam site, owned by Grand Hydro. Did you make that appraisal and arrive at your conclusion as to the value despite the fact that the Grand Hydro did not own all of the reservoir land?

A. I did.

Q. Did you make that appraisal and arrive at your estimate of value of this dam site — of these dam site lands, without regard to whether Grand Hydro possessed any permit or license from any governmental authority to build a dam on the river?

A. I did.

Q. Did you appraise it as an undeveloped dam site?

A. Appraised it as an undeveloped dam site.

Q. Now, I will ask you, Mr. Justin, if you formed an opinion as to the fair cash market value of those lands constituting the Pensacola dam site, as of date of January 1938, to January 1940, such value to be that

which the land would have in a transaction between a willing buyer and a land seller, taking into consideration all the uses of these lands constituting the dam site to which they could be reasonably adapted, and could within reason be applied at the time I have indicated, excluding the proposed or existing improvements of the Grand River dam. I am sure you have formed an opinion of that kind?

MR. MARSHALL: That is objected to, your Honor, for the reason there is no way to determine from counsel's question as to whether it was a dam for stock water, a dam for hydroelectric power purposes, or a dam for flood control, or what its capacity was, and many facts are left entirely out of consideration of this witness' testimony, which ought to be set forth as legitimate purposes, and as a foundation for his opinion.

MR. FOWLER: Your Honor, as I understand, Mr. Marshall is suggesting that that is a part of the cross-examination.

MR. MARSHALL: No, sir.

THE COURT: Overruled.

MR. MARSHALL: Exception.

By MR. FOWLER:

Q. You say you have formed an opinion as to the fair cash market value of the property I have talked about as to that time?

A. I have.

Q. Now, Mr. Justin, will you tell the jury what that opinion is?

MR. MARSHALL: We object, your Honor.

The COURT: You object to the question?

Mr. MARSHALL: Yes, sir.

The COURT: Overruled.

Mr. MARSHALL: Would your Honor permit me to state my objection?

The COURT: Yes.

Mr. MARSHALL: I am giving a copy of it to the reporter. It is more or less voluminous and divided into three separate and distinct parts, and we are prepared to have the Court consider the matters of this objection. (To the reporter) Frank, will you copy this into the transcript?

The REPORTER: Yes, sir, I will copy it.

(A copy of which said objection handed to the reporter, is as follows, to wit:)

Plaintiff objects to the question because:

1. That Grand-Hydro did not possess a valid permit or license to apply the waters of Grand River to any beneficial use, because it has not been shown that an adjudication of water rights in Grand River was had prior to the time of the granting of its permit by the State Conservation Commission as required by the laws of Oklahoma and as declared by *Owens v Snyder*, 52 Okla. 772, 152 P. 833, and *Gay v. Hicks*, 33 Okla. 675, 124 P. 1070, and as required by the Water Code of the State;

2. That Grand-Hydro's water use permit is not shown to have been kept in good standing because it is not established that it constructed one-fifth of the

works called for thereby within two years from the date of said permit's issuance ;

3. That it has not been shown that Grand-Hydro had any right, under its permit from the State Conservation Commission, to construct any dam on the so-called dam-site tract in question ;

4. Nor does it appear that Grand-Hydro secured any amendment to its permit allowing it to (1) defer the commencement and completion of the construction of one-fifth of its proposed works within two years from the date of issuance of said permit or (2) to construct a dam or dam improvements on the dam-site tract in question.

Plaintiff objects, additionally but separately, to the question because :

It has not been shown that Grand-Hydro could, as of the date of the "taking" of the dam-site lands in question, have been reasonably expected to acquire, within a reasonable time, the lands necessary to be combined with the alleged dam-site lands in order to complete the control, for project purposes, of the whole of the lands necessary to enable the dam-site tract in question to be utilized for dam-site purposes without exercising the power of eminent domain.

Plaintiff objects, additionally but separately, to the question because :

Grand River, being an immediate tributary of the Arkansas River, a federally adjudicated navigable stream of the United States, and a generally recognized navigable stream below the mouth of Grand

River, is within the jurisdiction of Congress under the Constitution of the United States to regulate and control in behalf of the interests of interstate and foreign commerce, it has not been shown that Grand-Hydro, prior to the date of taking of the dam-site lands in question:

1. Filed a declaration of intention to build any dam at said dam-site, or at any location on Grand River, as required by the Federal Power Act;

2. Filed, or secured the granting of, an application for a preliminary permit to construct a dam at the dam-site in question;

3. Secured a Federal Power license to construct any dam at the dam-site in question;

4. Filed any application for such a Federal Power license;

5. That the Federal Power Commission had ever found that the building of such a dam structure as that described in the question propounded and in the testimony given concerning the adaptability of said dam-site would not affect the interests of interstate for foreign commerce.

* * *

MR. MARSHALL: We again object to the question and the answer sought to be elicited as incompetent, irrelevant, and immaterial, and particularly because the record discloses clearly and affirmatively that the Grand Hydro did not at the time those lands were taken, or at any time prior thereto, have any permit or license from the Conservation Commission of the

State of Oklahoma to construct any dam or other river improvements for the purpose of generating hydroelectric energy on Grand River upon the dam site lands in question comprising, according to Grand Hydro's contention, some 417 acres.

The COURT: Overruled.

Mr. MARSHALL: Exception.

The COURT: Call the jury in.

(At this time the jury is duly returned into open court, whereupon the trial of said cause proceeds as follows, to wit):

By Mr. FOWLER:

Q. Mr. Justin, just before recess I had asked you if you had formed an opinion as to the fair cash market value of those lands constituting the Pensacola dam site, and the rest of the question, as you will recall it, and I believe you said you had formed an opinion as to the fair cash market value. Now, I will —

A. (Interrupting) I have.

Q. (Continuing) I will ask you to tell the jury what that opinion is.

Mr. MARSHALL: Your Honor please, we renew our objection.

The COURT: Overruled.

Mr. MARSHALL: Exception.

A. In my opinion the fair market value of the dam is over \$850,000.

* * *

CROSS EXAMINATION

By Mr. DAVIDSON:

* * *

Q. Mr. Justin, you have never lived in Oklahoma, have you?

A. No, sir.

Q. And you never did go over the Grand River dam project before it started, did you?

A. Not before any construction was started.

Q. You are not familiar with the sales of land in the Grand River dam valley, are you?

A. No, sir.

Q. And never have been?

A. That's right.

Q. And you don't know what any of that land in that valley ever sold for, do you?

A. That's right, of my own knowledge.

Q. Of your own knowledge. You have had no experience in buying and selling land in Oklahoma?

A. No, I am not an expert on land, just on dam sites.

Q. And you never engaged in buying and selling land in the Grand River valley, did you?

A. No, sir.

Q. You are not acquainted with the status of the titles of the land involved in the Grand River dam project, were you?

A. No sir.

Q. You don't know whether there was any state owned land in that area?

A. No, sir.

Q. And you don't know whether there was any federal owned land in that area, do you?

A. No, sir.

Q. And you don't know whether there was any restricted Indian land in that area?

A. No, sir.

Q. And you don't know whether there was any tribal cemeteries in that area or not, do you?

A. Well, I think it is probable that there are cemeteries, because I never saw a project yet that didn't have some cemeteries.

Q. That is just a guess on your part that this one did have, isn't it?

A. It is a little more than a guess. Any place that has been settled for any length of time is bound to have cemeteries in a scope of fifty thousand acres.

Q. You don't know about the number of miles of railroad that will have to be re-located, do you — did you?

A. Except from the maps.

Q. And you don't know anything about the character of the road beds?

A. Well, in general I do. I have seen plenty of those road beds. I don't know what sort of railroads there are.

Q. And you don't know how many bridges would have to be relocated?

A. No sir, not of my own knowledge.

Q. And you don't know how many state, federal and county roads have to be relocated, do you?

A. Well, I had maps that showed that there was a considerable number of them.

Q. You don't know anything about the number of towns that had to be relocated, did you?

A. Yes — now, right there, of course those things are shown by the topographic maps. You can see them right on there.

Q. And you don't know anything about the oil pipe lines and gas pipe lines that have to be removed, do you?

A. Only in the same way.

Q. Just from the map?

A. Just from the map and from information from the engineers that were working on the project.

Q. Did the map show the location of the pipe lines?

A. I can't be sure whether it did or not now.

Q. You don't know anything about the number of telephone or utility lines that had to be removed, do you?

A. Only from the work of the other engineers that were working on their construction and moves.

Q. You don't know anything about the acreage of Indian tribal lands that had to be acquired, did you?

A. No, I didn't, but they have all those difficulties on their projects, you know.

Q. Well, you always have to use the power of eminent domain to get them, don't you?

A. No, sir

Q. Do you know of any project that has been accepted that didn't resort to the power of eminent domain?

Mr. FOWLER: We object to that, your Honor please.

The COURT: Overruled.

Mr. FOWLER: Exception.

A. I have known of such projects.

By Mr. DAVIDSON:

Q. It is rare instance, isn't it?

A. It is not overly rare.

Q. In nearly all of those cases the power of eminent domain is used to unite the land under one ownership, isn't it?

Mr. HUDSON: Your Honor please, may we have an objection to all of this line of testimony and the same ruling?

The COURT: Yes, sir.

A. The power of eminent domain as I conceive it, merely means that the owner is entitled to compensation. They can get this land by other means; they can condemn it, and then the value, the fair value of that land, is assessed by the court. That is what I think it means.

Mr. DAVIDSON: That's right.

A. And, of course, that power is possessed by almost all public utilities.

Q. And they use it too, don't they?

A. They sometimes use it, but I know of a great many companies that have a policy to never use it.

Q. Did you know at the time of the taking of these lands involved in this case, the Grand River Dam Authority had already acquired approximately 29,000 acres of reservoir land in this reservoir, and that under the law of the creation of the Grand River Dam Authority that land could not be alienated?

A. I didn't know anything about that.

Mr. HUDSON: If the Court please, we object to the question as incompetent, irrelevant, and immaterial.

Mr. DAVIDSON: Under provision of the enabling act, if your Honor please, prohibits the Authority of disposing of any land —

The COURT: (Interrupting) That is a legal question.

Mr. MARSHALL: That is one of the grounds of the objection that has been made.

The COURT: Well, the objection will be sustained, except that part of it — (hesitating)

Mr. DAVIDSON: We offer to show by this witness, if he were permitted to answer, that he would say that he didn't know.

Mr. HUDSON: We object to the offer as incompetent, irrelevant and immaterial, and one that has been passed right squarely on by the Supreme Court.

The COURT: A part of that question is all right.

Mr. DAVIDSON: May I put the question this way, your Honor —

Q. Mr. Justin, did you know that at the time the Grand River Dam Authority took the lands involved in this case, that it had already acquired and owned approximately 29,000 acres of reservoir lands in the basin of the reservoir created by the dam?

Mr. HUDSON: Incompetent, irrelevant, and immaterial, and it is overruled by the opinion in this case.

The COURT: Overruled.

Mr. HUDSON: Exception.

By Mr. DAVIDSON:

Q. You know that?

A. No, sir, except by hearsay.

Mr. HUDSON: We move to strike the answer of the witness as incompetent, irrelevant, and immaterial, and prejudicial.

The COURT: Overruled.

Mr. HUDSON: Exception.

By Mr. DAVIDSON:

Q. You are not a lawyer, are you, Mr. Justin?

A. No, sir, I know nothing about the law.

Q. Now, I believe you said, that you gave your opinion as to the fair market value of this dam site without giving any consideration to the fact that the Grand Hydro had not united and acquired under its ownership all of the lands necessary for the project, is that true?

A. No, sir.

Q. You did take that into consideration?

A. I took into consideration the fact that they owned the dam site, but might not have owned all of the reservoir lands. My answer was regardless of whether they did or did not.

Q. Did you give any consideration to the fact as to whether or not they had acquired all of the overflow land?

A. That's right, it is absolutely independent.

Q. Did you give any consideration to the question of whether or not there was any reasonable probability that the Grand Hydro, or the grantee of the Grand Hydro, could, within a reasonable time acquire and unite under one ownership all of the lands necessary

to constitute the building of the project, so that the dam site could be utilized for dam site purposes?

MR. HUDSON: If the Court please, the defendant objects to that portion of the question which relates to the proposition of whether or not the condemnee could unite it; that would depend upon what the purchaser could do and not the condemnee.

THE COURT: (To the reporter) Read the question, Mr. Reporter.

(At this time the question is duly read to the Court by the reporter.)

THE COURT: Overruled.

MR. HUDSON: Exception.

THE WITNESS: The grantee means also anybody that they might sell it to?

MR. DAVIDSON: That's right.

A. They might sell it to anybody?

Q. Anyone other than the Grand River Dam Authority.

A. That's right.

Q. You did take that into consideration, did you?

A. The Grand River Dam Authority is a public body; that is the owner of the project now.

Q. Anyway, you took that into consideration, did you?

A. Yes, sir.

Q. Did you take into consideration the fact that the Grand Hydro had never filed a declaration of intention to the Federal Power Commission, or applied to the Federal Power Commission, for a license or permit to build a dam on Grand River?

Mr. HUDSON: Object to that as incompetent, irrelevant, and immaterial, and that has been answered in the opinion of the Supreme Court in this case.

The COURT: Overruled.

Mr. HUDSON: Exception.

By Mr. DAVIDSON:

Q. Did you take that into consideration?

A. I took — I didn't know what the facts were whether or not there had been a permit granted, or whether the Federal Power Commission — what had been done, but my opinion was entirely regardless of whether it had been done or not.

Q. It was regardless of whether they held a permit from the state or held a permit or license from the Federal Government — you gave that no consideration?

A. As I saw it, it wouldn't make a bit of difference.

Q. But I am asking you whether or not you gave any consideration to that?

A. I gave consideration to the fact that I included it in my mind, but that it didn't make any difference whether they had the different things from the government or not.

Q. And therefore you didn't give any consideration to that fact?

A. I didn't know the facts, so I couldn't.

Q. You didn't know whether they had a license of any kind?

A. No.

Q. Now, Mr. Justin, the larger percentage of those projects you have been connected with, either in the

capacity of appraising the dam site, or as consulting engineer on them, were located in the east, were they not?

A. No, sir, where is it you draw the line?

Q. Well, I would say east of the Ohio, and Mississippi Rivers?

A. Well, without giving a little time to it, and making a study, my impression is approximately half and half.

Q. Approximately half and half?

A. Yes, sir, certainly half of them were west of that line.

Q. Are you acquainted with the doctrine of riparian rights that apply to the eastern states?

A. I have heard the matters discussed.

Q. You know what it means?

A. Well, not very clearly.

Q. Are you familiar with the doctrine, the arid states' doctrine of water rights that prevails in the western states?

A. In the same way.

Q. You know there is a difference between the two?

A. In certain states.

MR. FOWLER: Your Honor, we will object to that line of cross-examination.

THE COURT: Sustained.

* * *

WILLIAM F. UHL, called on behalf of defendant, Grand Hydro, in chief, having been duly sworn on oath, on direct examination, testified as follows, to wit:

Q. Now, Mr. Uhl, would you indicate the price or value of the Pensacola dam site about which this lawsuit is concerned?

A. Yes, I would.

Q. You were engaged to put a price on that dam site?

A. Yes, I was.

Q. When were you so employed?

A. I think it was something in 1939 or 1940.

Q. By whom were you engaged?

A. I was engaged by Mr. Lyons of the Grand Hydro.

Q. Now, as a result of that engagement, have you studied the value of the Pensacola dam site?

A. I have.

Q. What sources of information have you used — how did you set about to acquire the knowledge you have to have in order to price it?

A. I was furnished with various reports and documents, information about it by both private and governmental agencies.

Q. Was that information of such character and quality and quantity as to enable you to form an opinion as to the value of the Pensacola dam site?

A. Yes, it was.

Q. Did you conclude that by reason of its physical formation and location, that it had a value as a dam site or did not have a value as a dam site?

A. I concluded from my investigation that it did have a value as a dam site.

A. That it did have a value as a dam site?

A. Yes, sir.

Q. Now, can you tell the jury in as few words as you can, just what led you to that decision — in a general way.

A. I found that a dam could be built there, and that the physical conditions were such that it would be feasible to build a dam; that a certain amount of water could be impounded there and stored there, and that a development could be made to create electrical energy which would be suitable for the market in this territory.

Q. Did you find that that energy would be available or marketable in competition with any other power that might be available there?

A. Yes, I determined that it would be.

Q. Mr. Uhl, I will ask you if, as a result of your investigation and your experience, you have formed an opinion as to the fair market value of the lands constituting the Pensacola dam site as of the years 1938, 1939, and 1940, in a transaction between a willing buyer and a willing seller, taking into consideration the uses to which those lands were reasonably adaptable and could in reason be applied at that time, but excluded from consideration the benefits of the proposed or existing improvements of the Grand River dam there? Have you formed such an opinion?

A. Yes, I have formed an opinion.

Mr. MARSHALL: That is objected to for the reasons heretofore stated, namely, that the type and the adaptable character of those lands has not been stated.

The COURT: Overruled.

By Mr. FOWLER:

Q. Now, Mr. Uhl, in forming that opinion as to the value, you knew, did you not, that Grand Hydro, the owner of these dam site lands, did not own all of the reservoir lands?

A. I knew that, yes.

Q. Did you arrive at your opinion as to the value despite the fact that they did not own all of the reservoir land?

A. Yes, sir.

Q. Was your opinion as to the value influenced by whether or not the Grand Hydro had any governmental permits or licenses to build the dam?

A. No, sir.

Q. Did you appraise it as an undeveloped dam site?

A. I did.

Q. Now, I will ask you to now state to the jury your opinion as to the amount of the fair market value of the dam site which I described to you?

Mr. DAVIDSON: Now, if the Court please, with the consent of counsel, may it be shown the same objections as to all questions propounded Mr. Justin may be interposed at this time, and the same objections as to this witness?

The COURT: The same objection interposed to the testimony of the witness Justin, and the same ruling of the Court.

Mr. DAVIDSON: Exception.

The COURT: All right.

The WITNESS: What was the question?

(At this time the question is duly read to the witness by the reporter.)

A. My opinion of the fair cash market value of the dam site is \$1,000,000.

By Mr. FOWLER:

Q. Now, in asking you this next question, Mr. Uhl, I am going to ask you to disregard the fact that in 1935, the State of Oklahoma passed this Grand River Dam Authority Act, which purported to give the Authority the exclusive jurisdiction over this part of the river, and disregarding that Act, I will ask you if in 1938 and 1940, there was a reasonable probability that this dam site land would be combined with other lands necessary to the completion of a water power project within the reasonably near future, as of that date?

Mr. DAVIDSON: The Authority objects to the question for two reasons: First, because it hasn't been shown that this witness is qualified to express an opinion on the question submitted him, and second, because the question is not predicated on facts appearing in the record in this case.

The COURT: Overruled.

Mr. DAVIDSON: Exception.

A. In my opinion there was such a probability that the lands would be combined for a dam site.

Mr. FOWLER: You may cross-examine him.

CROSS EXAMINATION

By Mr. DAVIDSON:

Q. Mr. Uhl, these lands could not be used as a dam site unless you also had under your control the necessary lands on which the flood waters, on which the flood waters would be impounded by the dam, could it?

A. No, sir.

Q. And without those necessary reservoir lands, the dam site would have no value as a dam site, would it?

A. Oh, yes, sir.

Q. But if you couldn't use it.

A. Couldn't use it?

Q. Yes.

A. The dam site had a value.

Q. Regardless of whether or not you could use it?

A. Of course you could use it.

Q. You just answer my question. You couldn't use it unless you had the reservoir lands under your control in which the water is impounded, could you?

A. That is true.

Q. If you didn't have the reservoir lands you couldn't use the dam site lands for a dam site, could you?

* * *

A. Not until you acquired the lands, but I don't know of any reason why you couldn't acquire them.

Q. And unless you could, the dam site would have no market value as a dam site, would it?

A. That's true.

Q. Mr. Uhl, do you know anything about the status of the ownership of the lands of the reservoir of the Grand River dam project?

A. No, sir.

Q. You don't know whether or not any of that land was owned by the State, or the federal government, or by Indian tribes?

A. Only by hearsay.

Q. Only by hearsay?

A. That's right.

Q. You don't know how much is owned by the State or how much is owned by the federal government?

A. No, sir.

Q. Or how much is owned by Indian tribes?

A. No, sir.

Q. Do you know anything about the roads and highways that would have to be relocated if the dam was built?

A. Only in a general way.

Q. You never did go over this project—just looked at the dam one time, didn't you?

A. Well, I have been on the railroad and observed the reservoir.

Q. From the railroad?

A. Yes, sir.

Q. And that is about the extent of your acquaintanceship with Oklahoma, isn't it?

A. Pretty near.

Q. You have lived in the east all your life, have you not?

A. Oh, no.

Q. Ever live in the west ?

A. Yes, indeed.

Q. But you have never lived in Oklahoma, have you ?

A. No, sir.

Q. Do you know anything about the extent of the relocation of the railroads made necessary by this project ?

A. No, sir.

Q. Do you know anything about the extent of the relocation of townsites made necessary by this project ?

A. No, sir.

Q. Do you know anything about the extent making necessary the relocation of utility lines and telephone lines ?

A. No, sir.

Q. Do you know anything about the number and length of pipe lines that had to be removed and relocated ?

A. No.

Q. You know anything about the public utilities that have to be removed and relocated ?

A. No, sir.

Q. Now, Mr. Uhl, of course you had in mind some specific kind of project being built that would justify a market value of this dam site at a million dollars, didn't you ?

A. Within limits, yes, sir.

Q. What kind of a project did you visualize ?

A. I visualized they would create a head of 125 feet power installation, but probably might begin with 50,000 kilowatts, and would ultimately have 90,000 or 100,000 or more kilowatts.

* * *

WILLIAM P. CREAGER, called on behalf of the defendant, Grand Hydro, after having been duly sworn on oath, on direct examination, testified as follows, to wit:

* * *

Q. Do you remember about when it was you were employed in this matter?

A. I think it was in 1939.

Q. When you were thus employed, did you undertake to investigate this dam site and determine its value?

A. Yes, sir.

Q. Just tell the jury what you did in order to arrive at your appraisalment.

A. I personally had a conference in Washington, and I received as much data as I could, and I went over to the Federal Power Commission and got a lot of data that was not among the reports that had been furnished to me, and I was out here and visited the site, went over the site, studied the conditions. The work was in progress at that time, and I took a trip up the lake and went down the river for about a mile, and I looked around and I went back to Buffalo, and—well, previous to that time I had done some work in Buffalo, and the next trip was at the previous trial, and then there was a rest for a few years, and I spent

about a week or ten days extending my studies for preparation for this new trial.

Q. Did you have furnished to you certain documents, such as the report of the Fargo Engineering Company and the report of Mead & Seastone?

A. Yes, sir, and other government reports.

Q. Did you get ahold of all government reports you could find pertaining to the subject?

A. Got ahold of all I could find. If there was any published pertaining to the subject, I didn't know about them.

Q. Did you consider the information set forth by the government publications, and other publications correct?

A. Yes, sir, I took the statistics for that.

Q. Was it sufficient to enable you to form an appraisal of the market value of this property?

A. That, together with more investigation and studies, and other knowledge of the subject, and I obtained a lot of government specifications, government reports.

Q. Now, did you come to any conclusion with respect to whether or not this particular piece of land here, which is said to consist of 417 acres, 362 acres that Senator Davidson has suggested as the tract, that comprised the dam site, did you come to any conclusion with respect to whether it had a special adaptability or value as a dam site?

A. Yes, sir.

Q. What was that conclusion?

A. That it did have a special adaptability value as a dam site.

Q. Now, did you arrive at an appraisal of the value of that piece of land considering that adaptability as a dam site?

A. Yes, sir.

Q. Will you tell the jury, in your own words, generally the facts that led you to conclude that it had a special value for dam site purposes, such as physical characteristics of the property, and the market conditions which your studies have impressed you with, and any other factors you might care to state to the jury.

A. I found that this dam site was particularly adapted for the installation of an economical dam and power house for the generation of power, and found that the foundations were suitable for a good foundation; that most any kind of a dam could be built there, a buttress reinforced core dam, or any other type of dam, solid concrete dam, earth dam, or a rock filled dam, and then that the site was adaptable to the installation of a hydroelectric power of from 60,000 up to 150,000 kilowatts; and then there was ample drainage to regulate the flow of the stream in order to use that water as anyone would desire to use it; that there was also sufficient head at the site for the generation of power, and then that the power which could be produced from that development at that site, could be used in the supplying of the market in place of building steam plants.

In other words, if the purchaser of this dam site had an increasing demand for power, he would have

a chance of either building a steam plant of anywheres from 60 to 150,000 kilowatts, or the installation of an hydroelectric plant at this site for from 60 to 150,000 kilowatts, and then if he decided to build his 60 to 150,000 kilowatts installation at this site of an hydroelectric power plant, he could do it very much more cheaply and more satisfactorily than he could a steam plant, and that he could afford to pay a considerable sum for this site and develop it in supplying the market in preference to any other method for supplying that market; and found that the site was strategic located with respect to the market, and found there was ample growth to justify the purchase of the property for the creation of power for the market, and found that this site, that it was adaptable for storage, in that it would improve the power site below on the river and found that conditions were such that one could easily expect there would be a purchaser for the property.

Q. Now, Mr. Creager, is there any difference in placing the value upon a dam site in Oklahoma from any other part of the United States in the general conditions that you apply to the subject?

A. No, sir, the method is the same.

Q. Now, based upon your experience that you have outlined in the appraisals of property, and based upon your familiarity with this particular Pensacola dam, I will ask you if you formed an opinion as to the fair market value of those lands constituting the Pensacola dam site, as of the years 1938, 1939, and 1940, in a transaction between a willing buyer and a willing seller, taking into consideration the uses to which the

dam site lands were adaptable, and could in reason be applied at that time, excluding from your consideration the benefits of the proposed, or existing improvements, of the Grand River Dam Authority? Have you formed such an opinion?

A. Yes, sir.

Q. Now, I will ask you before I ask you what that opinion was, and what that fair market value was, do you know that the Grand Hydro, the present owner of the dam site, or the owner at the time of the condemnation, owned only a small part of the reservoir lands?

A. Yes, sir, I knew that.

Q. Did you arrive at your opinion as to the fair market value considering that fact?

A. Yes, sir.

Q. And you appraised it as an undeveloped dam site?

A. Yes, sir.

Q. And did you appraise it without regard to the fact, without regard to whether or not the Grand Hydro had any privileges or permits or licenses, from some government authority?

A. I did not take that into consideration.

Q. Now, I will ask you then to now state to the jury the fair market value as above outlined.

MR. DAVIDSON: Your Honor please, we would like to now *to* interpose the same objection we interposed to the corresponding question asked the witness Justin, and also no adequate foundation has been laid of the

description of the character and use, which forms the basis of the witness' opinion as to values.

The COURT: The record may so show, show the same objection and same ruling, and the exception as has been interposed to the testimony of Mr. Justin where the same question was raised.

A. In excess of \$900,000.

By Mr. FOWLER:

Q. Now, this further question: I will ask you, I want you to take into consideration the fact that in 1935, the Oklahoma Legislature enacted this Grand River Dam Authority Act, so disregarding that Act, I will ask you as of 1938 and 1940, was there a reasonable probability that these dam site lands would be combined with other lands necessary to the completion of a water power project in the reasonably near future?

Mr. DAVIDSON: We object to that on the same grounds that we interposed before to a similar question asked the witness Justin.

The COURT: Overruled. It goes to the weight of his testimony.

Mr. DAVIDSON: Exception.

By Mr. FOWLER:

Q. What is your answer?

A. Yes, sir.

Mr. FOWLER: That's all.

Cross-examination.

By Mr. DAVIDSON:

* * *

Q. Now, Mr. Creager, I will ask you if you knew at the time this dam site was taken by the Grand River Dam Authority, that the Authority had already acquired 29,000 acres of land in the reservoir?

Mr. HUDSON: Object to that as incompetent, irrelevant, and immaterial.

The COURT (To the reporter): What was the question?

(At this time the question is duly read to the Court by the reporter.)

The COURT: Overruled.

Mr. HUDSON: Exception.

The WITNESS: I didn't know that.

By Mr. DAVIDSON:

Q. Did you know that under the Act of the Legislature of Oklahoma creating the Grand River Dam Authority, it couldn't dispose of any of those lands that were necessary for the operation of the project?

Mr. HUDSON: Object to that as incompetent, irrelevant, and immaterial, and that question was overruled by the opinion of the Supreme Court in this case.

The COURT: Sustained.

Mr. DAVIDSON: Note an exception, and we make the offer that if the witness were permitted to testify, he would testify that he didn't know.

Mr. HUDSON: Same objection.

The COURT: Overruled.

Mr. HUDSON: Exception.

By Mr. DAVIDSON:

Q. Mr. Creager, did you know whether or not any of those reservoir lands were owned by the State of Oklahoma?

A. Why, I had all that information from Mr. Hunt's report. I had complete information, but I can't give you the exact details of it now. As I told you before, I took his estimates of the area from what I heard from him, and from what I could acquire.

Q. You knew, did you not, that that report was dated back in 1929?

A. When I said reports, I didn't necessarily mean a written report. I meant all the data I had obtained from him, either written or by word of mouth.

Q. Did you know whether or not there was any government owned land in that reservoir that had to be acquired?

A. I don't recall that. I would have to look in my book here to find it. If you will pardon me a moment, if you think that would help any here.

Q. Oh, I just wanted to know whether you knew it or not. You had that information around January, 1940, did you?

A. I think it was the latter part of 1939 that I made those estimates.

Q. Did you have any information as to the status of the title of the various tracts of land in the reservoir area?

A. No, sir, no direct information.

Q. Did you have any information as to the number of railroads that had to be relocated?

A. Only from Mr. Hunt's information which he gave me.

Q. You never inspected the railroads that had to be relocated?

A. No, sir.

Q. Did you have any information as to the number of oil pipe lines and telephone lines that had to be relocated?

A. No exact information.

Q. And as to the number of pipe lines that had to be relocated?

A. No.

Q. Did you get any information as to the townsites had to be relocated?

A. I had been told about them.

Q. Did you make any study of the cost as to what the relocation of them would be?

A. As I told you before, I took Mr. Hunt's estimation of that.

Q. You made no inquiry of the value from anybody except Mr. Hunt about what was necessary to be done in order to utilize these lands for reservoir purposes?

A. No, sir.

Q. Did you make any investigation of the value as to the difficulties to accomplish the ownership, or acquisition of the lands that were necessary for this project?

A. I have been through quite a number of similar cases, and I haven't seen anything to show that this was different than the ones I have been through.

Q. Mr. Creager, I will ask you if it isn't a fact that any project—all of these projects, the company or the individual concerned that constructs the project, are required in order to unite the lands in one ownership, to use the power of eminent domain?

Mr. HUDSON: Object to that, if the Court please, as incompetent, irrelevant and immaterial.

The COURT (to the reporter): Read the question.

(At this time the question is duly read to the Court by the reporter.)

The COURT: Overruled.

Mr. HUDSON: Exception.

The WITNESS: Answer?

Mr. DAVIDSON: Go ahead.

A. It has been done quite a number of times without the power of eminent domain.

Q. Is that true in projects where the land is in private ownership, and you have to assemble it all under one control?

A. Yes, sir.

Mr. HUDSON: Object to that as incompetent, irrelevant, and immaterial—the same objection, and for the further grounds, your Honor, that the condemnée in this case has not sought to prove enhanced value of the dam site, because it possessed the power of eminent domain.

The COURT: Sustained.

By Mr. DAVIDSON:

Q. I will ask you, Mr. Creager, if you know of any project where it is necessary to unite under one ownership some 2500 separate tracts that were owned by

state, federal government, restricted Indians, and Indian tribes, that were united without the exercise of the power of eminent domain?

Mr. HUDSON: Object to that as incompetent, irrelevant, and immaterial and for the further ground the rule of eminent domain cannot be exercised against the government. I don't know of any way that you can condemn lands of the United States government.

The COURT: Overruled.

Mr. HUDSON: Exception.

Mr. DAVIDSON: Go ahead.

A. I don't know of any case of where the lands that you mention, the type you mention, were acquired by eminent domain.

Q. Do you know of any single instance of where there was something like 2500 separate tracts to be acquired?

A. I don't know about the 2500—

The COURT (Interrupting): I believe that is argumentative.

The WITNESS (Continuing): but I do know of a number of cases where there was a large number that was obtained without the aid of eminent domain.

By Mr. DAVIDSON:

Q. I believe you testified on direct examination, that I asked you this—just to be sure in my own mind, if you didn't take into consideration in making your estimate, whether or not the Grand Hydro had a permit from the State of Oklahoma or the federal government to build this project. Were you asked that on direct examination?

A. I think so.

Q. And you said you didn't take that into consideration?

A. Yes, sir.

* * *

Recross-examination.

By Mr. DAVIDSON:

Q. Mr. Creager, in making your estimate of value, did you assume that the Grand Hydro had the right to and could use this dam site for dam site purposes, didn't you?

A. Yes, sir.

Q. As a matter of fact—

Mr. HUDSON (Interrupting): We move to strike it as incompetent, irrelevant, and immaterial. The test is whether or not the purchaser could use it.

Mr. DAVIDSON: I will modify the question to include the Grand Hydro, or any ordinary grantee of the Grand Hydro.

Mr. HUDSON: Incompetent, irrelevant, and immaterial, so far as it includes the condemnee, because that couldn't affect the market value. The condemnee can sell his rights.

The COURT: Overruled.

Mr. HUDSON: Exception.

By Mr. DAVIDSON:

Q. Mr. Creager, this—this dam site—what was your answer to the revised question?

A. Yes, sir.

Q. Now, this dam site would have no value as a dam site, no market value as a dam site, unless it could be used for that purpose, would it?

A. No.

Q. And you couldn't use this dam site for a dam site, unless you had the lands on which to impound the waters above the dam, could you?

A. You couldn't use it until some—it couldn't be used until some one had obtained those lands for the reservoir.

Q. And you couldn't use it as a dam site without using a reservoir in connection with it, could you?

A. No, sir.

* * *

ROBERT E. HORTON, called on behalf of defendant, Grand Hydro, in chief, after having been duly sworn on oath, on direct examination testified as follows, to wit:

* * *

Q. Now, Mr. Horton, let me ask you this: Does it make any difference in which part of the United States the undeveloped dam site is located with respect to what it is you have to apply to appraise it?

A. No, I would say not. The elements of value are the same, but they differ in degree and character. There might be a great difference between two power projects and dam sites in the State of Pennsylvania, or in other places, in California, or other places, but the general principles are the same anywhere.

Q. Mr. Horton, were you employed by Grand Hydro to appraise the Pensacola dam site?

A. I was, yes.

Q. About when were you employed?

A. Early in October 1940.

Q. Who employed you?

A. Mr. B. F. Lyons, of the Grand Hydro Company.

Q. What did you do in response to that employment?

A. I made studies, and later came out here and investigated the Pensacola project, which, of course, at that time was fully developed, and I gathered information from various sources, including government reports with which I was familiar, and with which I had worked in relation to the power facilities of the Grand and Neosho Rivers, including the reports of the War Department, of which there was two, and I have access to the report of the National Resources Board—various reports and studies which had been made by the owners of the Grand Hydro and which were available to me. The stream flow records, much of which I had already studied, and analyzed in connection with my other work independent of this, and the general power situation and market for hydro-electric energy, the development of energy which is generally required, and which could be produced by development of the Pensacola project.

Q. You obtained all of the information you could get your hands on, did you?

A. Yes, I think I did.

Q. Did you consider that sufficient to enable you to make an independent appraisal of the value of this land as a dam site?

Q. Now, this dam site would have no value as a dam site, no market value as a dam site, unless it could be used for that purpose, would it?

A. No.

Q. And you couldn't use this dam site for a dam site, unless you had the lands on which to impound the waters above the dam, could you?

A. You couldn't use it until some—it couldn't be used until some one had obtained those lands for the reservoir.

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Q. Who employed you?

A. Mr. B. F. Lyons, of the Grand Hydro Company.

Q. What did you do in response to that employment?

A. I made studies, and later came out here and investigated the Pensacola project, which, of course, at that time was fully developed, and I gathered information from various sources, including government reports with which I was familiar, and with which I had worked in relation to the power facilities of the Grand and Neosho Rivers, including the reports of the War Department, of which there was two, and I have access to the report of the National Resources Board—various reports and studies which had been made by the owners of the Grand Hydro and which were available to me. The stream flow records, much of which I had already studied, and analyzed in connection with my other work independent of this, and the general power situation and market for hydro-electric energy, the development of energy which is generally required, and which could be produced by development of the Pensacola project.

Q. You obtained all of the information you could get your hands on, did you?

A. Yes, I think I did.

Q. Did you consider that sufficient to enable you to make an independent appraisal of the value of this land as a dam site?

A. Yes, sir.

Q. Tell the jury what you found with respect to any advantages of this land as being adapted as a dam site?

A. I found that there was a strong channel in the river at this location with rock foundations and rock for abutments, which for a dam is always desirable, and there was material available also which could be utilized for an earth or a part earth dam, if so desired. So far as the dam site was concerned, there was available alternatives as to the manner or types of construction, which is always desirable, because the type of development always depends to a considerable extent on who uses it.

I found the dam site favorable, and the borings showed sound rock underneath that this location; also it was the uppermost dam site of the Grand and Neosho Rivers where sound rock existed, and has a large drainage area and provided a regular flow of the stream, so that it would serve, not only as a basis for power development at the Pensacola site itself, but it in the future *it* would provide a regular line for other power developments further downstream; and then, also that the site projected the building of a dam of sufficient height to provide a large volume of storage, and the value of the dam site largely depends on, you might say, four things: The amount of heads, or flow, which can be used; the amount of flow of the stream, the degree to which that flow can be regulated so it can be used to produce the energy when and where required, together with the cost of development,

and in addition to that, the location with reference to the market, and then this dam site is located in a region which I considered to be very favorable as regards the market for the type of energy which could be produced. Now, there are some things less favorable; the reservoir itself is somewhat irregular in outline, and covers things out of line in various tracts, which necessitates a large area of land being used, which would not be required in a more compact reservoir, but that is characteristic in the Grand River valley but outside of mountain regions and regions where there are no closer lakes and you can get a more compact reservoir, but, as I said, that is characteristic of practically all dam sites in the Mississippi valley and it is no more or less objectionable than the average, and it is highly desirable taking into consideration all of the representations which I have described.

Q. Was this dam site close enough to the center of consumption of electricity to make it desirable?

A. In my opinion it is, especially in a system for the use of energy. These different utility companies power, they interchange, so that when one has a surplus of energy, it can be used by another, so you can put your finger on a particular customer. It goes to anybody that needs it, and it may be acquired within a radius of 300 miles or more.

Q. Now, Mr. Horton, based upon your investigation of this particular site, and all facts which affect it, and based upon your general experience in your profession, I will ask you if you have formed an

opinion as to the fair market value of those lands constituting the Pensacola dam site as to the years 1938, and 1940, in a transaction between a willing buyer and a willing seller, taking into consideration all the uses to which they were reasonably adaptable and could in reason be applied at that dam, excluded from your consideration the benefits of the proposed or existing improvements by the Grand River Dam Authority. Have you formed such an opinion?

A. I have.

Q. Before I ask you how much that opinion goes to, did you know that the Grand Hydro, the owner of that dam site at that time, did not own all of the reservoir land?

A. I knew that it did not.

Q. Did you arrive at the figure as to the value which you will testify to in a few minutes, despite that fact that the Grand Hydro did not own all of the reservoir land?

A. Yes, sir, I figured—you might say my judgment was based on that state of facts, that it didn't own all of the lands and its value under those conditions, despite the fact that it didn't own it.

Q. You valued it as an undeveloped dam site?

A. I did.

Q. Did you arrive at this value without reference to whether or not the Grand Hydro in itself held any license or permit from any governmental body?

A. I would have to answer that this way: I took that into consideration, and I did not assume that the

owner of this land did have any federal license at that time. It is a question—it is the man who bids on it, rather than the man who owns it that needs this license.

Mr. MARSHALL: He says the man who buys it rather than the man who owns it as to securing the necessary permits. We object to that for the reason it is incompetent, irrelevant, and immaterial, and states a conclusion of law on the part of the witness, and I ask that the jury not consider that portion of that answer.

By Mr. FOWLER:

Q. What has been your experience, Mr. Horton, in past situations involving the same questions, as to which it is that needs the permit?

Mr. MARSHALL: Same objection is interposed to that question for the reason his past experiences has no—is no criterion from which to determine the market value.

The COURT: I believe I will sustain the objection.

Mr. MARSHALL: Will your Honor instruct the jury not to consider that part of the witness' testimony?

The COURT: It is probably a matter of law.

Mr. FOWLER: It seems to be a matter that can be testified to as a fact through his experiences. This was partially true anyhow.

The COURT: He can state what he took into consideration. The Court probably will instruct the jury on it.

Mr. FOWLER: Exception.

The COURT: Just that particular part.

By Mr. FOWLER:

Q. Now, Mr. Horton, will you tell the jury as to whether it was necessary or not necessary for a permit at the time—strike that part. Just as a conclusion, the conclusion, you will disregard and that only. Now, Mr. Horton, will you tell the jury what your opinion is as to the fair market value as of 1938, and as of 1940, as I described in my question concerning the fair market value?

A. Yes.

Mr. DAVIDSON: We object to that, if the Court please. The plaintiff objects, without repeating the objection for the reasons assigned in the objections to the testimony of the witness Justin, relative to the same matter, and if counsel has no objection, I don't desire to repeat the objection in full.

Mr. Fowler: That's all right.

The COURT: The record may show the same objection to this question as above propounded to Mr. Justin. Overruled.

Mr. DAVIDSON: All right.

A. \$750,000.

* * *

Cross-examination.

By Mr. DAVIDSON:

* * *

Q. Now, Mr. Horton, in arriving at your estimate on this dam site, did you calculate the cost of the project, what it could be built for?

A. Yes, I used figures on costs and quantities that were furnished to me by the Grand Hydro, and from the reports of the Army Engineers and the National Resources Board, and I checked that over and compared that with data which I had for cost considerations.

tion, which was an independent estimate of the old

Q. What type of project did you take as the basis for your calculations?

A. Not any one specific type, as the opportunity existed for construction of dams of several types from the type that was used, and the earth dam, and I considered both in comparison, and in my opinion there was a leeway of which the different types of construction that could be made, which were economically sound.

Q. Is your estimate based on any particular capacity of the project?

A. Four to six units, and my final figure is the result of calculations and studies, and the answer to your question so far as the calculations were concerned, I considered a plant with four operating units, and a fifth unit for use to keep up the power at times when the head flow was reduced by the tearing down of the river.

Q. Now, what head did you use in your judgment of that value?

A. A 130-foot head, with a 140-foot operating head.

Q. What height of dam would that involve?

A. That would be a spillway elevation — I don't carry all of those figures in my mind.

Q. Did you investigate the market for power in this area?

A. Yes, I largely relied on the report of the National Resources Board, and I asked the engineers to submit that to me, based upon the data collected by the Federal Power Commission.

Q. Did you calculate the possible revenues from the project?

A. Yes, I gave that consideration. That is a thing where you can't use some particular figure, because different customers very probably will use it in different ways. I gave that very careful consideration.

Q. And as a result of your studies of the cost of the project, and the revenues which might be obtained from it, you figured from that that the dam site was worth \$750,000?

A. Yes, sir, all things being considered, it was my final judgment that it was worth \$750,000.

Q. Mr. Horton, did you know that at the time that this dam site was taken by the Grand River Dam Authority, the Authority had already acquired and owned approximately 29,000 acres of the reservoir land of this project?

Mr. HUDSON: Object to that, if the Court please, as incompetent, irrelevant and immaterial.

The COURT: Overruled.

Mr. HUDSON: Exception.

A. I didn't know how much they had acquired. I knew they had acquired some land—that they were acquiring land.

Q. Did you know that there was some 1200 or 1300 acres of state owned land that required an act of the Legislature to get title to?

A. I think I did. I recalled that question being raised at the time I was here.

Q. Did you know that there was a large acreage of tribal lands involved in the reservoir?

A. Yes, I knew that lands—perhaps that is a legal question, but I knew that that question exists in this part of Oklahoma very frequently, that Indian rights in tribal lands do exist, but at the present time it is one of those things that isn't stressed greatly in affecting the value of power sites.

Q. Did you know that a large acreage of lands owned by restricted Indians, had to be approved by the Secretary of the Interior—did you know that?

A. Not as to any specific item, but I knew those questions of the Indian lands existed.

Q. Did you know that the construction of this project involved the relocation or removal of the trackage of two railroads, one of about seven miles, and the other about five?

A. Yes.

Q. Did you know the number of telephone and utility lines that had to be removed and relocated?

A. I had figures on that, figures on railroads, public utilities, cemeteries, and other items outside of the actual land that was involved here, and as to the other things mentioned, I took them all into consideration.

Q. Did you make your calculations, or take into consideration, in making your estimate, of the type or the physical aspects, I might say, of the project, that was covered in the Fargo Engineering Company's report?

A. Yes, sir, I knew the reports that had been made by the Fargo Engineering Company, and they related to, what I would call the physical aspects, of the dam site.

Q. And they involved a project very similar to the one the Grand River Dam Authority built?

A. Yes, to the one that was actually built.

Mr. DAVIDSON: I think that is all.

Mr. FOWLER: Come down, Mr. Horton.

(Witness excused.)

Mr. DAVIDSON: Your Honor please, the Authority moves now that the testimony of this witness be stricken, for the reason that his own estimate shows it is based on the worth of this project to the builder, but not from the standpoint of—over and above the cost of construction, and it is based on a construction cost which is inhibited by the decision.

The COURT: Overruled.

Mr. DAVIDSON: Exception.

* * *

No. 20195

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE WEBB, JR., MARGUERITE WEBB, RICHARDS
MATTHEWS, JR., ROBERT RUFİ and EUGENE C.
JONES,

Appellants,

vs.

BEVERLY HILLS FEDERAL SAVINGS AND LOAN
ASSOCIATION, FEDERAL HOME LOAN BANK
BOARD, LYTTON FINANCIAL CORPORATION, BART
LYTTON, BETH LYTTON, THOMAS W. CLARKE, DR.
SAMUEL J. SILLS, GLENN WILSON and H. P. BRA-
MAN,

Appellees.

Opening Brief of Appellants Eugene Webb, Jr., Mar-
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Rufi, Eugene C. Jones.

Jurisdictional Statement.

This action was originally brought by Beverly Hills Federal Savings and Loan Association against the Federal Home Loan Bank Board pursuant to 12 U.S.C. 1464(d)(1), the Home Owners Loan Act of 1933, as amended, and the Federal Declaratory Judgments Act, 28 U.S.C. 2201, 2202. The court below had jurisdiction of that basic controversy. Beverly Hills Federal Savings and Loan Association subsequently amended its complaint to name individual defendants as a matter of pendent jurisdiction, although no cause of action against them was stated. The Federal Home Loan

Bank Board filed cross-claims against these individual defendants. This Court has jurisdiction of the appeal from the judgment of the court below pursuant to 28 U.S.C. 1291, 1294.

Statement of the Case.

This action was initiated by Beverly Hills Federal Savings and Loan Association (hereinafter referred to as "Beverly Hills") against the Federal Home Loan Bank Board (hereinafter referred to as "Bank Board") pursuant to Section 1464(d)(1) of Title 12, U. S. Code, after the Bank Board had made certain charges against Beverly Hills and others arising out of the transfer of control of Beverly Hills to certain new parties. The filing of the action stopped administrative hearing proceedings.

The complaint [Tr. p. 2] asked a Declaratory Judgment against the Bank Board that the transfer of control of Beverly Hills was proper. The Bank Board filed a Motion to Dismiss [Tr. p. 5] and a Notice of Pendency of Other Actions and Proceedings [Tr. p. 16] claiming that Beverly Hills had failed to join as defendants the prior officers and directors of Beverly Hills, Eugene Webb, Jr. and others, and the new officers and directors, Thomas W. Clarke, Bart Lytton and others.

The Bank Board alleged that there were indispensable parties without which the action could not proceed. [Tr. p. 5.]

Beverly Hills then filed its Amended and Supplemental Complaint [Tr. p. 36] joining Eugene Webb, Jr. and the other former officers and directors of Beverly Hills and Thomas W. Clarke, Bart Lytton and

the other new officers and directors. No cause of action was stated against these new parties and Beverly Hills continued to assert the validity of the challenged transaction.

The Bank Board then filed an Answer, Counter-Claim and Cross-Claim [Tr. p. 42] charging breach of fiduciary relationship on the part of Webb, Clarke and Lytton and those associated with them. In essence, the cross-claims charged joint participation by these parties in the transfer of control of Beverly Hills and the sale of a companion company by a trust (for the Webb children) to Lytton Financial Corporation. The Bank Board claimed that the consideration paid the trust for the stock of the companion company (The Southland Company), and the consultant fees paid to Eugene and Marguerite Webb, were in large part payment for control of Beverly Hills.

Beverly Hills had been founded, and managed, by Eugene Webb, Jr. for some 25 years. Approaching age 70, he wanted to divest himself of his responsibilities. An arrangement was made to have a long time acquaintance, Thomas W. Clarke, an attorney skilled in the savings and loan field, and at the time an attorney for Lytton, become president and general manager of Beverly Hills.

Several years before this transaction, Webb had organized the Southland Company, an escrow and insurance company, to handle escrows and insurance for Beverly Hills and other customers. At this time (and until 1964) federal savings and loan associations were forbidden by their charters to engage in these activities and it was not uncommon for officers or directors of a federal savings and loan to operate such a com-

pany. No corporate opportunity was involved and none has ever been charged. Webb transferred the stock of Southland to an irrevocable trust for his children before Southland actually began to engage in business. The trustees were Mr. and Mrs. Webb and Title Insurance and Trust Company.

At the time Clarke agreed to assume the presidency of Beverly Hills, Bart Lytton proposed to buy Southland. Webb agreed with the understanding that Clarke, and not Lytton, would control Beverly Hills. Lytton did insist, however, that he hold the proxies in Beverly Hills (presumably to protect Southland's relationship with Beverly Hills). At Clarke's insistence, Webb agreed to the transfer of proxies and the various transactions were carried out in March of 1961.

About a year later, Bart Lytton moved in and took control of Beverly Hills installing himself as President. Clarke had resigned meanwhile and one H. P. Braman was in office when Lytton took over. It now appears that Clarke never did sever his relationship with Lytton when he assumed the presidency of Beverly Hills but was acting as a front for Lytton all the time.

In making their charges with regard to these transactions, the Bank Board avoided the use of the word "conspiracy", but did allege joint participation in transferring control of Beverly Hills by unlawful means. The elements of conspiracy alleged will be detailed below so that this chronological narrative will not be disrupted.

Immediately after Webb relinquished control of Beverly Hills, the new administration attempted a transfer of some \$15,000,000 in loans from Beverly Hills to Lytton Savings and Loan Association in exchange

for a similar amount of loans transferred to Beverly Hills. The terms of the transfer were such that the Bank Board stepped in and forced a rescission of the transfer. Thereafter, Bank Board examiners were in nearly constant attendance at Beverly Hills up to the date of the Judgment complained of on this appeal.

This action was filed in 1962 and dragged along with discovery proceedings and an attempted intervention and appeals thereon until late 1964. At that time Bart Lytton made a deal with the Bank Board whereby Lytton and all his cohorts were to be dismissed from this lawsuit and the Lytton interests were to get sums equivalent to everything paid for Southland and for consulting services from the Webbs, plus enough to cover taxes to be paid on this recovery. The total came to about \$1,875,000. Southland ownership passed to Beverly Hills and the Lytton's turned the management of Beverly Hills over to appointees of the Bank Board.

The transaction itself was not only interesting but has substantial hearing on this appeal. Bart Lytton, acting as President of Beverly Hills, the plaintiff, and for himself individually and representing his other interests as defendants, made the deal with the Board. An amendment to the Home Owners Loan Act of 1933 was passed in 1964 permitting a federal savings and loan association to invest up to 1% of its assets in another (companion) corporation. (12 U.S.C. 1464-(c).) However, the Beverly Hills charter had not been amended to permit this. [McMurray Depo. pp. 195-198, 202-206.] Further, Beverly Hills didn't have \$150,000,000 in assets to take advantage of the new law. [See Financial Report Sept. 30, 1964, McMurray Depo. Ex. 12.] So—the Federal Home Loan Bank

Board of San Francisco, as part of this settlement, loaned Beverly Hills in excess of \$10,000,000 to bring its assets up to \$150,000,000.

In order to generate the \$300,000 to reimburse Lytton for consultants fees paid to the Webbs over the five years of their contracts, the Bank Board authorized Beverly Hills to buy some \$12,500,000 in loans from Lytton Savings and Loan Association at a *premium*. The profit on this transaction also allowed an additional \$75,000 to Lytton Savings to pay the taxes it would incur in recouping the \$300,000 (which, incidentally, had been originally paid by Lytton Financial Corp. and not Lytton Savings).

Lytton and Beverly Hills then prepared a so-called "Stipulation for Settlement and Entry of Judgment of Dismissal" [Tr. p. 105] and a "Judgment of Dismissal" [Tr. p. 112] which they presented to the Court below in utmost secrecy and with no notice to the remaining defendants, the Webbs and their former co-officers and directors. After the Court pointed out the conflict of interests of Bart Lytton stipulating on behalf of plaintiff Beverly Hills and on his own behalf as defendant, the parties went out and in less than twenty-four hours rounded up a new Board of Directors for Beverly Hills chosen by the Bank Board. They then took the Stipulation and Judgment to the Court authorized by the new Board of Directors. Bart Lytton and his associates were also given a Covenant Not to Sue, executed by the new Board of Directors of Beverly Hills, absolving them of any claims arising out of their conduct of the management of Beverly Hills.

The so-called Stipulation only revealed the dismissal of the Lytton parties, the purchase of Southland by Beverly Hills and certain details relating to transfer of control. The other financial factors mentioned above were not disclosed. [See Reporter's Transcript for January 13 and 14, 1965.] The Court below refused to endorse the Stipulation but permitted the simple dismissal.

Not only was no notice given of these *ex parte* proceedings, but the reporter's notes were sealed and the parties avoided any disclosure to counsel for *amicus curiae* in this case who happened to be in the Judge's courtroom at the time the Lytton attorneys, Bank Board attorneys and Bart Lytton himself left the Judge's chambers. [Rep. Tr. Vol. III, p. 18.] Counsel for the Webbs learned of the settlement after Lytton and the Bank Board provided the press with press releases following the entry of the Judgment of Dismissal. Webb's attorneys were never served with any of the documents filed and obtained the same only after requesting them after reading in the newspapers of the dismissals.

Specification of Errors.

1. The Court erred in dismissing defendants and cross-defendants Lytton Financial Corporation, Bart Lytton, Beth Lytton, Thomas W. Clarke, Samuel J. Sills, H. P. Braman and Glenn Wilson.

2. The Court erred in not dismissing *all* defendants and cross-defendants who were alleged to be co-conspirators with the parties dismissed.

3. The Court erred in not dismissing defendants and cross-defendants Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones, who were alleged to be co-conspirators with the parties dismissed.

4. The Court erred in granting a Judgment of Dismissal after court proceedings of which these defendants and cross-defendants received no notice or knowledge, and at which defendants and cross-defendants were not present.

Issues on Appeal.

The Specification of Errors can be refined to two basic issues:

I.

The propriety of the dismissal of all but one alleged conspirator without dismissal of the remaining alleged conspirator.

II.

The propriety of the clandestine court proceedings where the alleged co-conspirators were dismissed in utmost secrecy and with no notice to the remaining defendants.

In this approach we would like to comment that Specification of Errors 2 and 3 are separately stated because certain defendants, namely Matthews, Rufi and Jones, were not parties to any of the transactions or considerations and merely cast votes of approval as directors on the acceptance of resignations of directors and election of new ones. They are not alleged to have received any of the funds allegedly paid for control of Beverly Hills. To this extent their positions and those of Mr. and Mrs. Webb are dissimilar.

Summary of the Argument.

In the Argument herein, we have pointed out (1) that the pleadings by the Bank Board, though deliberately devoid of any use of the term "conspiracy", do in fact allege a conspiracy by Bart Lytton and his associates on the one hand (all acting through Thomas W. Clarke and Bart Lytton) and Eugene Webb, Jr. and his associates on the other (all acting through Eugene Webb, Jr.); (2) that the Webbs, and their associates, all acting on behalf of Beverly Hills, as officers and directors thereof, should be treated as a single (alleged) conspirator; (3) that one may not conspire with himself; (4) that where all the alleged co-conspirators but one have been dismissed from a lawsuit, conspiracy charges against the remaining alleged sole conspirator cannot be sustained because there is no longer a conspiracy; and, finally, (5) the clandestine procedure in Court without notice to, or knowledge by, the non-dismissed defendants, and the denial of the right of these defendants to be heard was grossly unfair and a manifest miscarriage of justice.

ARGUMENT.

I.

It Was Improper for the Court Below to Dismiss All but One of the Alleged Co-Conspirators Without Dismissing the Remaining Alleged Conspirator.

A. The Elements of Conspiracy Alleged.

At the outset this Court should note that all the affirmative claims of wrongdoing in this case are those by the Bank Board in its Answer, Counter-Claim and Cross-Claims. [Tr. p. 42.] The prayer of the Bank Board asks for certain disciplinary measures against all of the cross-defendants. While the Bank Board also purports to ask for monetary relief, by so doing it alleges a cause of action in which it has no legal interest, *i.e.*, it can't claim damages for someone else—Beverly Hills. To assert a valid claim for damages, the Bank Board should have appointed a conservator or receiver to sue on behalf of Beverly Hills, something the law (12 U.S.C. 1464(d)) provided for but which the Board elected not to do.

Nevertheless, the charges actually allege a conspiracy although that term is never used.

The following allegations we believe constitute an over-all claim of conspiracy.

1. Charging defendants Webb, Matthews, Ruff and Jones with "participating in the furtherance and accomplishment of an agreement to elect and maintain certain designated persons in office as Officers and Directors of the Association . . ." [Tr. p. 48, par. (i), p. 7.] (Also alleged in Board Resolution 15,430, p. 5, par. (b) [Tr. p. 23] and in Resolution 15,703, p. 5, par. f [Tr. p. 31].)

2. The allegation that these acts were “unlawful.” [Tr. p. 49, par. (j), p. 8.]

3. Allegations coupling transfer of control of the Association with the sale of Southland [Tr. p. 49, par. K, p. 8] thus completing the elements of conspiracy of persons acting in concert to do a lawful act by unlawful means.

4. Similar allegations that the Lyttons “participated in and encouraged” certain acts such as alleged purchasing of directorships and proxies in Beverly Hills, and inducing and benefiting in breaches of trust by the Webbs and their associates. [Tr. p. 49; par. (1), p. 8.]

5. Allegation that substantially all of the sale price for Southland (\$1,500,000) and the \$120,000 then paid the Webbs under the Personal Service Agreement “was agreed to be paid in the transfer of control of plaintiff Association, including the transfer of proxies and the directorships.” [Tr. p. 55, par. 13, p. 14.]

6. Allegation that Lytton Financial Corporation “participated in the consummation of the breaches of trust of the then directors and managing parties . . .” (Eugene Webb, Jr. and associates.) [Tr. p. 66, par. 14, p. 25.]

This allegation is also found in Charge I(b) of Resolution 15,703. [Tr. p. 30.]

7. Finally, there is the charge that the Lyttons . . . “are *equally at fault* for violation of law and the regulations of this Board in the reconstituting of the Board of Directors of Beverly Hills Federal Savings and Loan Association, the purchasing of directorships and the sale of proxies *with*

the Webbs and the former Board of Directors of Beverly Hills Federal Savings and Loan Association, since they participated in and encouraged these respective transactions." (Emphasis added.) [Tr. p. 31, par. (e).]

See also Charge III of Resolution 15,703. [Tr. p. 31.]

8. It should also be noted that the Bank Board alleged that the Webbs and their associates and Lytton and his associates were *indispensable parties* at the time it forced the joinder of these defendants by its Motion to Dismiss. [Tr. p. 5.]

It is submitted that these allegations state all the classic requirements for a conspiracy.

15 C.J.S., Conspiracy §1, p. 996.

"A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means."

All the elements of this definition are met in the Bank Board pleadings, *i.e.*, concert of action (alleged as joint participation and agreement), a lawful purpose (transfer of control of Beverly Hills), by unlawful means (alleged receipt of consideration and profit for the transfer of control).

While the appellees will contend that no conspiracy is alleged, the pleadings belie this claim.

B. The Webbs and Their Associates Constitute a Single Alleged Conspirator.

Eugene Webb, Jr., Marguerite Webb, Richards Matthews, Jr., Robert G. Ruff and Eugene C. Jones were all officers and directors of Beverly Hills, a savings

and loan association. Eugene Webb, Jr. negotiated the transfer of control of Beverly Hills and the others carried out the transaction by Board of Directors' action of having the old directors resign and new ones appointed.

Where officers and directors act on behalf of a corporation, they are considered a single entity or single conspirator.

Packaged Programs, Inc. v. Westinghouse Broadcasting Co. (1957), D.C. Pa., 156 F. Supp. 76, 78, holding that a corporation cannot conspire with itself. In that case it was charged that Westinghouse, "through its agents, servants or employees" had conspired. The court (at p. 78) quoted from *Nelson Radio & Supply Co. v. Motorola* (5 Cir. 1952), 200 F. 2d 911, 914, as follows:

"A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. Here it is alleged that the conspiracy existed between the defendant corporation, its president, Calvin, its sales manager, Kelly, and its officers, employees, representatives and agents who have actively engaged in the management, direction and control of the affairs and business of defendants."

In *Johnny Maddox Motor Co. v. Ford Motor Co.*, D.C. Tex. (1960), 202 F. Supp. 103, it was alleged that:

"Ford Motor Company, through its officers, agents, employees or representatives, and through corporations, franchises, or divisions thereof over which defendant exercised control engaged in a conspiracy. . . ."

United States v. Carroll (D.C.S.D. N.Y. 1956), 114 F. Supp. 939, 942, the court said:

“It is true that corporations have been held to be parties to a conspiracy . . . (citing cases). . . . However, in all such cases, one corporation had been in concert with another or with individuals who were not members of the corporation.”

The court then cited *Nelson* for the proposition that a corporation may not conspire with itself.

Accord:

April v. National Cranberry Association, D.C. Mass. 1958, 168 F. Supp. 919.

While these cases do not deal directly with directors as such, the principle enunciated should equally apply. *All* the Beverly Hills directors are charged here with joint action (and therefore as corporate action) in transferring control of Beverly Hills. As such, they *are* the corporation which cannot conspire with itself.

C. There Must Be More Than One Conspirator.

With dismissal of all the defendants except the Webbs and their associates, only one alleged conspirator remains in this litigation.

“To constitute a conspiracy there must be a combination of two or more persons; one person cannot conspire with himself.”

15 C.J.S., Conspiracy, §2, p. 997.

As Judge Learned Hand stated in *Reitmeister v. Reitmeister*, C.C.A. 2 (1947), 162 F. 2d 691 at 696:

“Now it is as much a rule governing a civil action for conspiracy as a criminal prosecution, that there must be two conspirators . . .”

The court affirmed a dismissal as to the remaining conspirator after the other conspirators had been dismissed.

In accord see:

Kecppleman v. Upston, D.C.N.D. Calif. (1949),
84 F. Supp. 478, 480 (Judge Harris);

Johnny Maddox Motor Co. v. Ford Motor Co.,
D.C. Tex. (1960), 202 F. Supp. 103;

Elliott v. Paramount Film Distributing Corporation, E.D. Penn. (1961), 27 F.R.D. 495.

**D. An Action Having Only One Conspirator
Must Be Dismissed.**

The clearest statement on this point is found in *Elliott v. Paramount Film Distributing Corporation*, E.D. Penn. 1961, 27 F.R.D. 495, where the court said:

"In the present posture of the case, there is only one defendant. It is basic law that 'to constitute a conspiracy there must be a combination of two or more persons; one person cannot conspire with himself. Furthermore, there must be a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy.' 15 C.J.S. Conspiracy §2, p. 997. Having withdrawn their complaint against the distributor defendants with prejudice, there is no one left with whom the exhibitor defendant could have conspired. . . ."

Less clearly stated because of the way the case developed, Judge Learned Hand reached the same result in affirming the lower court's dismissal of the single remaining conspirator in *Reitmeister v. Reitmeister*, C.C.A. 2 (1947), 162 F. 2d 691 at page 695, 696.

These cases are on all fours with our present case.

E. The Court Below Erred in Either Not Refusing to Allow the Dismissal of the Co-Defendants or in Failing to Dismiss the Remaining Defendants.

The court below dismissed the co-defendants at a clandestine *ex parte* hearing where the appellants were denied notice and the opportunity to be heard. In light of the foregoing authorities it is submitted that the court should have dismissed all defendants or none of them.

II.

It Was Improper to Conduct Clandestine Court Proceedings Where the Alleged Co-Conspirators Were Dismissed in Utmost Secrecy and With No Notice to the Remaining Defendants.

Appellants assure this Court that the use of the terms “clandestine” and “utmost secrecy” are no exaggeration as the record will clearly reveal.

On January 13, 1965, counsel for Beverly Hills, counsel for Bart Lytton, Lytton Financial Corporation and the other Lytton defendants, counsel for the Bank Board, Thomas C. Clarke, Bart Lytton and Joseph McMurray, Chairman of the Bank Board were heard in the chambers of the court below in an *ex parte* proceeding. [Rep. Tr. Vol. II, p. 7.] [Also note appearances recorded at beginning of Rep. Tr. Vol. II (both days), showing appellant’s counsel not present.]

According to the court [Rep. Tr. Vol. 3, p. 8] all the proceedings, both in chambers and subsequently in court, were reported and are contained in the Reporter’s Transcript. In this the Court appears to be mistaken as shown by the opening remarks reported on page 3 of Volume II of the Reporter’s Transcript. The first statement made indicates a prior discussion by its very

nature. The record, such as it is, reveals no inquiry by the court as to notice to appellants or as to their absence.

In any event, although the Court ultimately granted the Judgment of Dismissal only, and refused to endorse the Stipulation for Settlement, the interests of appellants were discussed throughout the hearing [Rep. Tr. Vol. II] although they were not afforded the right to be present.

The hearings were intended to be secret as the actions of the parties indicated. Mr. Corinblit, counsel for *amicus curiae* (and attempted intervenors in this case) stated in open court [Rep. Tr. Vol. 3, p. 18] that he encountered these counsel in the court's ante-room and that they made no mention of their mission there or that his case was under discussion with the Court. He asked one attorney about it, "but I got a kind of ambiguous answer."

After the hearings, conducted on two successive days, the court ordered the reporter's notes sealed [Rep. Tr. Vol. II, pp. 28, 34], and finally unsealed them effectively twenty-four hours after the Judgment was signed. [Rep. Tr. Vol. II, pp. 41, 42.]

The court later explained to counsel for appellants that he had protected their interests by not signing the Stipulation for Settlement and by amending the Judgment of Dismissal to provide that the rights of remaining parties were preserved. [Rep. Tr. Vol. 3, p. 6.]

The unfortunate part was that the Stipulation for Settlement omitted all the really questionable parts of the deal between Bart Lytton and the Bank Board and while the court may have "smelled a rat" when he re-

fused to endorse the stipulation, appellants believe he never was apprised of the full nature of the transaction.

Instead of the judgment "protecting" the interests of the appellants, all it did was leave appellants as the sole defendants and let the Lytton defendants go "scot-free." All rights against appellants were specifically preserved. The so-called "preservation" of non-existent rights of appellants was of little consolation.

At the time of the settlement, Bart Lytton was President of plaintiff Beverly Hills, an officer or director of defendant Lytton Financial Corporation, and was an individual defendant. As such he represented both the plaintiff and certain defendants in his dealings with defendant and cross-complainant Bank Board.

Far from the interests of appellants being protected by the Judgment of Dismissal, very drastic changes have taken place in the complexion of this lawsuit which are highly prejudicial to the appellants.

By the settlement agreement, the Board of Directors of Beverly Hills resigned and a new Board, all chosen by the Bank Board, have taken control. Whereas, the first Amended and Supplemental Complaint of Beverly Hills contended that the Bank Board charges were unfounded and that appellants were not guilty of any wrongdoing, the new alignment since the dismissal has Beverly Hills (by a Second Amended and Supplemental Complaint) now contending that appellants are at fault and claiming \$1,800,000 under a theory of constructive trust. Originally, these claims were made only by the Bank Board, which had a doubtful right to recover against appellants. Now, Beverly Hills, if it can sustain basic jurisdiction under 12 U.S.C. 1464-

(b)(1) has a direct claim. Instead of being participants in a concerted defense to the Bank Board claims, appellants have been left "holding the bag" while Lytton gets off clear and with a big profit.

The deposition of Joseph McMurray [Depo. pp. 84, 85, 89, 90], then Chairman of the Bank Board, clearly reveals that Bart Lytton's operations at Beverly Hills were of great concern to the Bank Board and that they were prepared to do almost anything to get him out of control. McMurray [Depo. pp. 84, 85, 89, 90, 141, 142] revealed how Lytton had been taking big salaries, and charging off unusually large expenses and contributions to his philanthropies.

The stage was then set for Lytton to propose a settlement [See Ex. 7 to McMurray Depo.] whereby Beverly Hills would buy Southland from Lytton Financial Corporation for \$1,500,000, the amount paid the Webb children's trust. This was despite the fact that the Bank Board had claimed that the original price paid for Southland was actually for control of Beverly Hills and not the value of Southland and despite the fact that Lytton had reaped profits and salaries from Southland for four years.

Beverly Hills (1) didn't have authority under its charter to buy Southland [McMurray Depo. pp. 195-198, 202-206], and (2) did not have sufficient assets to meet the requirements of the 1964 Amendment to 12 U.S.C. 1464. [See last page of Ex. 10 to McMurray Depo.] The Bank Board ignored the first legal obstacle and had the Federal Home Loan Bank of San Francisco loan Beverly Hills in excess of \$10,000,000 [McMurray Depo. p. 211] to increase its assets sufficiently to be able to pay out \$1,500,000 as 1% of its

assets and to provide the funds to buy loans from the Lytton Savings and Loan Associations.

Lytton then asked for the \$300,000 paid to the Webbs under a Personal Service Agreement for consultants' services which had already been performed. To obtain this windfall, Lytton proposed that his Lytton Savings and Loan Associations sell some \$12,500,000 in notes to Beverly Hills at a premium. This sale was also to provide an additional \$75,000 to cover the taxes Lytton Savings would have to pay on the \$300,000 windfall. [Ex. 7 to McMurray Depo.]

Quite clearly, Bart Lytton and the Bank Board very cavalierly used Beverly Hills assets to make their deal.

The actions of the Bank Board are questionable at best when it is recalled that the Bank Board had always contended that Lytton was "equally at fault" [Tr. p. 31, par. (2)] in the whole original transaction. In fact, the sequence of events, with Clarke appearing to be an independent actor and then turning Beverly Hills over to Lytton, gives rise to the implication that Lytton was the prime culprit in the whole transaction.

The only part of these financial transactions revealed in the stipulation presented to the court for approval was the \$1,500,000 purchase of Southland. Lytton asked for and got two additional concessions: (1) a Covenant Not to Sue, giving him a clean bill of health on his Beverly Hills operation, and (2) the right to issue his own press release in the name of the Bank Board praising his operations at Beverly Hills. [McMurray Depo. Ex. 7.]

At the first day of the hearing at which the Judgment of Dismissal was signed, the Court pointed out

the conflict of interest wherein Lytton was acting for both Beverly Hills as plaintiff and himself and his interests as defendants. [Rep. Tr. Vol. II, pp. 25, 26.] As a result, the Lyttons and Bank Board went out that evening (the proceedings had started at 4:40 P.M.) [Rep. Tr. Vol. II, p. 3], rounded up a new Board of Directors for Beverly Hills, gave them some kind of a briefing [McMurray Depo. pp. 113-115, 123-130, 134, 138-141, 173, 174] and had them approve the agreement at about 5:00 A.M. the next morning. [Rep. Tr. Vol. II, p. 40.] At 9:00 A.M. they were back in court. [Rep. Tr. Vol. II, p. 37.]

It is the appellant's contention that this entire transaction was not only a fraud against the shareholders of Beverly Hills in the misuse of its funds to buy off Bart Lytton, but was carried out in such a manner as to be grossly unfair to appellants by conducting hearings vitally important to appellants, in secrecy, and without an opportunity to be heard reaching a result unfair to the appellants. Where the federal government is a party claiming two parties conspired in a manner affecting federal government regulatory powers, it is just not fair, equitable, or proper to dismiss out one of the parties, leaving a single group of defendants unless the government gets something in return. While McMurray sought to justify the dismissal of the Lyttons on the basis of need to remove the Lyttons from control of Beverly Hills, the "settlement" was actually a complete abandonment and whitewash of all claims by the government against the Lyttons. The extraordinary consideration given to Lytton's demands for settlement and the excessive amounts paid out of Beverly Hills assets at the direction of the Bank Board leaves the

entire transaction highly suspect and with a clear aura of impropriety. In permitting a dismissal under these circumstances, appellants submit that the court greatly abused its discretion in conducting this hearing and, as stated in Part I of this Argument, should have insisted upon, or ordered, the dismissal of all remaining defendants.

There is no question as to the clandestine and secret conditions under which those hearings were held. Had the appellants been afforded the opportunity to appear, and to expose the fraud being perpetrated on the court, the result might well have been different. When the court later denied the Motion to Vacate or in the Alternative to Dismiss, it still did not have before it the full details of the transactions as revealed in the McMurray deposition. [Deposition filed June 24, 1965; Motion Denied March 25, 1965.]

The court has intimated that the Judgment of Dismissal may have destroyed future jurisdiction as against these appellants [Rep. Tr. Vol. II, pp. 37, 39], but that hardly excuses the failure to take positive action at the time of these hearings.

Conclusions.

It is respectfully submitted that as a matter of law the Judgment of Dismissal should be reversed, or, in the alternative, that the appellants be dismissed from the action.

As a matter of fairness and equity, if the appellants are not dismissed out of the action, the Judgment of Dismissal should be reversed because of the frauds perpetrated on the court and the court's abuse of discretion and sense of fair play in conducting a secret hear-

ing where matters highly prejudicial to appellants were decided and where they were deliberately denied, and deprived of, the right to be heard.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MAX DEUTZ

No. 20195

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS
MATTHEWS, JR., ROBERT RUFİ and EUGENE C. JONES,
Appellants,

vs.

BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIA-
TION, FEDERAL HOME LOAN BANK BOARD, LYTTON
FINANCIAL CORPORATION, BART LYTTON, BETH LYT-
TON, THOMAS W. CLARKE, DR. SAMUEL J. SILLS,
GLENN WILSON and H. P. BRAMAN,
Appellees.

Reply Brief of Appellants Eugene Webb, Jr., Mar-
guerite R. Webb, Richards Matthews, Jr.,
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Supplementary Factual Statement.

Generally.

Due to certain of the statements made in the Briefs filed by the appellees, particularly the Federal Home Loan Bank Board, certain comments are necessary to place this case in its proper perspective.

In the Bank Board brief at page 2, the recital is made that the individual appellants were given notice of the resolutions of the Bank Board and given thirty days to correct their violation of law. Appendix A to

the Bank Board brief shows that notice is to be given to the association and “*Such Association* shall have thirty days within which to correct the alleged violation of law . . .” (Emphasis added.) Section 1464-(d)(1) of Title 12 U.S.C., makes no reference to proceedings by or against individuals.

Indispensability of Parties.

At page 3 (including the footnote), counsel for the Bank Board takes out of context and misstates the content of certain pleadings. The Bank Board’s Motion to Dismiss, which *forced* the association to join the Lyttons and the Webbs, stated as its *first* ground the indispensability of parties. [Tr. p. 5.] In the alternative, dismissal was asked for failure to join interested and necessary parties. Finally, as a last alternative, the Board contended that the original complaint did not present the entire controversy. The appellees believe that the thrust of this entire Motion to Dismiss was the “indispensability of parties” and that the association would never have brought the Lytton and Webb defendants into the action except by being forced to do so on this ground. Now the Bank Board, having forced the association to join both the Lyttons and the Webbs, has participated in the dismissal of the Lyttons while at the same time it attempts to maintain the action against the Webbs. Having forced the naming of the Webbs as indispensable parties, they should now be estopped to deny that indispensability.

Essence of Original Amended Complaint.

Also at page 3 of the Bank Board brief (and again at p. 10) the Board says the association incorporated the Board resolutions in the Amended Complaint. This was true, however, only in regard to the

controversy between the association and the Board. [Tr. p. 39, Amended Complaint par. XI.] The charges in the resolutions were never alleged as against the appellants by the association. A reading of the pleading makes this abundantly clear.

In paragraph XII [Tr. p. 40] the association alleged:

“Said defendants, other than defendant Board, are parties who have a joint interest with plaintiff. It does not appear, however, that they have any standing to initiate an action pursuant to 12 U.S.C. §1464(d)(1) as parties plaintiff. They are, therefore, joined as parties defendant, subject to the authority of the court to treat them as plaintiffs or defendants as may become appropriate in the conduct of this litigation.”

While the prayer of the Amended Complaint [Tr. p. 41] does ask for adjudication of the rights and obligations of the parties, this is simply the usual prayer for declaratory judgment, and it would be completely out of text to imply, as appellees do, that the association was asking, or suggesting, any relief against appellants. The whole complaint is directed against the Bank Board.

Jurisdiction.

At page 4 of the Bank Board brief, some irrelevant remarks are made to the effect that the appellants did not move to dismiss for lack of jurisdiction. This allegation is pointless unless waiver is contended. In any case, jurisdiction is not a matter that can be waived and failure to raise the question at that time (after the initial pleadings) does not preclude the question

being raised later, even on appeal. On a now pending motion on the Second Amended and Supplemental Complaint, this issue is being raised in the District Court on the grounds that the Association could not join the Webb defendants in their litigation because (1) there was no authority therefor under 12 U.S.C.A. 1463(d)-(1), (2) there is no federal question, (3) there is no diversity of citizenship, and (4) there could be no pendent jurisdiction as to the Webbs because the federal law cause of action is against the Bank Board and the state law cause of action is against the Webbs. Therefore, there is no dual statement of federal and state causes of action against the same defendant arising out of a single claim as required by the rules on pendent jurisdiction set forth in the case of *Hurn v. Oursler* (1933), 289 U.S. 238, 58 S. Ct. 586, 77 L. Ed. 1148.

Participation in Discovery.

At page 5 of the Bank Board brief, reference is made to the marked absence of appellants in discovery proceedings. This is misleading because all parties understood that as the association and the present appellants had common interests and as the association had Washington, D.C. counsel conducting the discovery, participation by Webb's attorneys would be unnecessary and costly duplication. No lack of interest on Webb's part can, or should be, implied from the fact that the association assumed this burden in the common interests of the association, the Lyttons and the Webbs.

Settlement Never Approved.

At page 6, the Bank Board says that Judge Whelan approved the settlement. He expressly refused to do so

[Tr. Vol. I, p. 22, *et seq.*, Vol. II, p. 41], and said he would go no further than to approve the Order of Dismissal.

There Were No Attempted Prior "Sales".

At page 7 of the Bank Board brief, the Bank Board misquotes the deposition of Eugene Webb, Jr. (this deposition is not a part of the record) by stating that he had attempted to sell the association to others prior to this transaction. This is a gross misstatement of fact. Webb testified on deposition that he had tried to *transfer control* of Beverly Hills to competent management so that he could retire and that he had tried to sell the Southland Company. He further related that in seeking transfer of control he had attempted to have the Bank Board approve a conversion of Beverly Hills (the association) to a stock company that could be sold to a holding company. However, such a conversion and sale would have called for pro rata distribution of the assets to the depositors and in no way contemplated a profit to Webb, except as a depositor. There was never any contemplated "sale" in the sense implied by the Bank Board brief.

Bank Board Examiners.

At page 14, the Bank Board implies that Bank examiners *were not* present at all times. It is true that appellants' counsel stated on motion in the court below that the examiner was a Mr. Spencer. As to this, it appears in the affidavits filed by the Bank Board that appellants were in error. The affidavit does not deny, however, that there were examiners present at all times, as alleged, though one of these examiners may have been misidentified as Spencer.

Corporate Opportunity.

At page 15 of the Bank Board brief there is a reference to Appendix C and the contention that a federal association could perform certain escrow functions. This is purely irrelevant because the Webb defendants have never been accused of taking advantage of a corporate opportunity of the association in the sale of Southland, and in fact Chairman McMurray of the Federal Home Loan Bank Board expressly disclaimed such a charge. [McMurray Depo. p. 29.]

Purported Justification for Secrecy.

The appellees attempt to justify the secrecy in ordering the dismissal in this case on the basis that there was danger of a run on the savings and loan association. It is highly unlikely that such a run would take place simply because a lawsuit was settled and an escrow company bought by the association. Appellants believe that the real reason for the secrecy was that the appellants would have forced the disclosure of all the facts involved in the settlement and that such facts could not stand the light of publicity.

Nevertheless, the appellees were successful in obtaining the dismissal by presenting a stipulation which withheld many of the key facts of the settlement and failed to disclose the real transaction.

Qualifications of Directors.

The Bank Board brief goes to great length to discuss the qualifications of the directors collected by the Bank Board and placed in office pursuant to the exer-

cise of proxies. At no time have the appellants challenged the *qualifications* of these directors. What appellants have tried to emphasize is the fact that the record is clear that an attempt was made to get the case dismissed based upon a stipulation by the Lytton controlled Board of Directors of the Association. Only after the Court raised the issue of conflict of interests between the Lyttons being both plaintiffs and defendants in the settlement did the parties go out at an adjournment of the court proceedings and obtained the new Board. Presumably, Preston Silbaugh had already been selected as Executive Officer, as he was available in Los Angeles at the time instead of being at his then place of employment in Chile. Director Spencer, however, learned of his selection on the evening of adjournment [McMurray Depo. p. 121] (the court proceedings ended somewhere after 5:00 o'clock on a Thursday and resumed the next morning at 9:00 A.M.) and summarily resigned from employment from the Federal Home Loan Bank Board. There has been no evidence as to when directors Boyko, Breslin and Webb were first contacted, but the McMurray deposition indicates they were gathered together the evening of the first day in court and stayed up all night until 5:30 A.M. in the morning to get the document signed. If this Board had been selected in advance and apprised of the proposed settlement, the parties would hardly have had to work all night to approve a previously agreed to settlement. In fact, it is reasonable to assume that they would have been the parties to have executed

the original settlement agreement. As it turned out, the only document signed by any new member of the association Board was the Covenant Not to Sue signed by Preston Silbaugh. All the other documents were signed by counsel for the parties, who were not substituted or changed during the overnight adjournment. The obvious conclusion therefore, as supported by the rather vague testimony of Chairman McMurray of the events of Thursday night, is that the Bank Board had to work from the adjournment of court on Thursday until 5:30 A.M. on Friday morning in order to get the new Board of Directors together, give them some sort of a briefing, and obtain a resolution authorizing the settlement.

Reich v. Webb.

At page 15 of the Bank Board brief, the Bank Board attempts to attach some significance to *Reich v. Webb*, 336 F. 2d 153 (9th Cir. 1964). The issues raised and decided there have no relevancy to these proceedings. Subject matter jurisdiction, which cannot be waived, has never been raised or determined, *Reich v. Webb* notwithstanding, because of the particular context of that appeal brought by attempted intervenors. This Court stated that the Bank Board had certain broad powers to obtain relief sought by the intervenors. The question of how these powers were to be specifically invoked was never a question before this Court. In the motions presently pending in the court below, the appellants have pointed out at some length that while the Bank Board had the powers to obtain

the relief sought by the intervenors they failed to exercise those powers in the manner provided by law. Title 12, U.S.C.A. Section 1464(d)(1), provides for action only between an association and the Bank Board. No authority can be found in that section for an action against individuals brought directly by the Bank Board. There is, however, another Section of 1464 (1464 (f)(1)) which does permit direct action against individuals by the appointment of a conservator or receiver for the association (a remedy likely to be used only where the association refuses to bring the action itself) where the Bank Board would step into the shoes of the association and exercise all statutory and common law remedies and pursue all causes of action that might be available to the association. For some reason, this legally authorized procedure was never used by the Bank Board. All of the parties to this litigation have exhaustively researched all litigation in which the Federal Home Loan Bank Board has been involved, and appellants have been unable to find, and appellees have failed to cite, a single case where the Bank Board has brought suit against individuals directly and in its own name.

LEGAL AUTHORITIES CITED.

I.

It Was Improper for the Court Below to Dismiss All but One of the Alleged Co-conspirators Without Dismissing the Remaining Alleged Conspirator.

The briefs of the appellees raise no new case authority, and despite the attack of the Bank Board on the authorities cited by the appellants, we submit that the lengthy dissection of the facts of these cases fails to disturb the basic legal concepts asserted. For example, the Bank Board spends considerable time discussing the facts of *Keppleman v. Upton*, 84 F. Supp. 478, cited by appellants. However, it appears to be immaterial *why* the co-defendants were dismissed. The fact is that, once they were dismissed, a single defendant remained and the court rightly held that he should be dismissed where charged with conspiracy. The *Keppleman* case said that the court could not entertain a cause of action against military personnel. It did not say that the plaintiff was foreclosed from proving that they were conspirators, although they might be unnamed as defendants.

Despite the involved facts of the *Reitmiester v. Reitmiester* and *Elliott v. Paramount Film Distributing Corporation* cases, those cases did in fact hold that a sole remaining alleged conspirator must be dismissed where the prior alleged conspirators had already been dismissed from the action.

The Bank Board does cite *Broadway & Ninety-Sixth Street Realty Corporation v. Loew's, Inc.*, 23 F.R.D. 9 (D.C., S.D., N.Y. 1958) and *Southern Electric Generating Company v. Allen Bradley Company*, 30 F.R.D. 135 (D.C., S.D., N.Y. 1962) where the District Court in each case held that it was proper to dismiss part of the defendants in anti-trust litigation while not dismissing the remaining defendants. Those cases, however, are distinguishable here because in each of these cases more than one alleged conspirator remained in the action. Neither of those cases involved dismissals reducing the case to a *single* remaining alleged *conspirator defendant*. This, appellants contend, is the basic distinction between the cases cited by appellants and those cited by the appellees. In each of the cases cited by the appellants the dismissal was on the basis that there was a single remaining alleged conspirator as defendant and that as that alleged single conspirator could not conspire with himself, the action had to be dismissed as to him.

II.

It Was Improper to Conduct Clandestine Court Proceedings Where the Alleged Co-conspirators Were Dismissed in Utmost Secrecy and With No Notice to the Remaining Defendants.

All of the appellees have carefully avoided discussion of this very touchy subject except a brief reference in one brief to the necessity for secrecy. As we have heretofore pointed out under the Supplementary Factual Statement, we believe the reason given for secrecy

is not the real one. A run on the association, or financial damage to the association, by reason of disclosure of the settlement as to the Lyttons was unlikely, particularly in light of the publicity whitewash given the Lytton operation of the association. [See McMurray Depo. p. 190.]

What the parties were really afraid of was that the Webb defendants would force disclosure of the entire transaction, part of which was illegal and *ultra vires* on the part of the association's officers. (See pp. 5 and 19 of Appellants' Opening Brief and pp. 194 *et seq.* of the McMurray deposition where he discussed the authority for associations to acquire other companies such as Southland and revealed that (1) the enabling resolution of the Bank Board authorizing such acquisition had not been passed (p. 195), and (2) that the Beverly Hills charter had not been amended to permit such an acquisition (p. 196, *et seq.*)).

There is no denial that the hearing was conducted in utmost secrecy (and the record is clear on this point) with the reporter's notes sealed until after the press release.

These appellants were denied any opportunity to be heard at that time to urge the points now raised on this appeal, or, as shareholders of Beverly Hills, to force disclosure of the facts to stop an illegal and *ultra vires* transaction as well as the misuse of the association's assets in buying out the Lytton control of Beverly Hills. The fact that appellants later had a hear-

ing on a Motion to Vacate was no satisfactory substitute when the transaction of sale back of the dismissal was already a *fait accompli*.

It is submitted that such conduct on the part of counsel and the court below merits the disapproval of this Court.

Suggestion as to Jurisdiction.

While the appellants have not stated as points on appeal the question of the jurisdiction of the court below to entertain the basic action, they have made certain motions on that ground to the court below on the now pending Second Amended and Supplemental Complaint.

The appellees themselves have raised the question of alleged failure to file motions to dismiss as against the original Amended and Supplemental Complaint and have implied a waiver of this defense on the part of the appellants. It is believed to be appropriate therefore, even though the question has not been raised as a point on appeal, to suggest to the Court that the question of jurisdiction be examined, as is the prerogative of any appellate court.

As stated under the Supplementary Factual Statement (*supra*), there is no authority for this action against individual defendants under 12 U.S.C.A. 1464-(d)(1). The reciprocal right to bring suit found in that section (Appendix A to the Bank Board brief) is between the association and the Bank Board. The association recognized the fact in paragraph XII of the

Amended and Supplemental Complaint [Tr. p. 40] where they stated:

“It does not appear, however, that they have any standing to initiate an action pursuant to 12 U.S.C. §1464(d)(1) as parties plaintiff.”

This reference was made in regard to the Lytton and Webb individuals.

Secondly, there is no federal question involved in this litigation and none has ever been urged.

Thirdly, there is no diversity of citizenship because the association is organized under the laws of the State of California and the individual parties defendant are all citizens and residents of the State of California.

Lastly, there is and can be no pendent jurisdiction existing under the association's Amended and Supplemental Complaint as to the Webbs because the federal law cause of action is against the Bank Board and the state law cause of action is against the Webbs. Therefore, there is no dual statement of federal and state causes of action against the same defendant arising out of a single claim. This is a requirement for pendent jurisdiction as set forth in the leading case of *Hurn v. Oursler* (1933), 289 U.S. 238, 58 S. Ct. 586, 77 L. Ed. 1148.

In *Hurn* the court set a double criteria for pendent jurisdiction by stating (1) the federal claim must not be “plainly wanting in substance” and (2) the federal and nonfederal claims must be but different grounds asserted to support a “single cause of action”. Here,

it cannot be contended that the federal claims (against the Bank Board by the Association), and the state law claim against the Lyttons and Webbs are part of a "single cause of action." Not only are there different defendants, but the relief asked against them is entirely different. The Amended and Supplemental Complaint makes it clear that the association had a dispute with the Bank Board but had no dispute with the Webb defendants.

This Court followed the *Hurn* rule in *Pursche v. Atlas Scraper & Engineering Co.*, 9th Cir. (1962), 300 F. 2d 467, 483, where the court approved "considerable overlap in their factual basis" and distinguished *Dubil v. Rayford Camp Co.*, 9th Cir. (1950), 184 F. 2d 899, where the operative facts were found to be different.

Likewise, there is no question of there being any ancillary jurisdiction because, as this Court stated in *Glens Falls Indemnity Company v. United States*, 9th Cir. (1950), 229 F. 2d 370, ancillary jurisdiction arises under a cross-claim under Rule 13 or a third party claim under Rule 14 (and therefore cannot arise in a complaint).

Standing of Appellants to Appeal.

The appellees Lytton devote most of their brief in reurging the previously argued Motion to Dismiss directed to this appeal on the ground that the appellants have no standing in this Court to appeal the decision of the District Court dismissing out the other co-

defendants. The appellants believe that that matter has been fully argued in the briefs heretofore submitted and that no further argument on this question is necessary at this time.

Conclusions.

It is respectfully submitted that for the reasons herein urged (1) these appellants should be dismissed from the action or (2) the judgment dismissing the Lytton defendants should be set aside and the parties returned to their respective positions in the litigation as they existed prior to the Judgment of Dismissal.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN P. POLLOCK



United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR.,
ROBERT G. RUF AND EUGENE C. JONES,

Appellants,

v.

BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION,
FEDERAL HOME LOAN BANK BOARD, LYTTON FINANCIAL CORPORATION,
ART LYTTON, BETH LYTTON, THOMAS W. CLARKE, DR. SAMUEL J. SILLS,
GLENN WILSON AND H. P. BRAMAN,

Appellees.

*Upon Appeal From the United States District Court
for the Southern District of California, Central Division*

BRIEF FOR APPELLEE, FEDERAL HOME LOAN BANK BOARD

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United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellants,

v.

BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION,
FEDERAL HOME LOAN BANK BOARD, LYTTON FINANCIAL CORPORATION,
ART LYTTON, BETH LYTTON, THOMAS W. CLARKE, DR. SAMUEL J. SILLS,
GLENN WILSON AND H. P. BRAMAN,

Appellees.

*Upon Appeal From the United States District Court
for the Southern District of California, Central Division*

BRIEF FOR APPELLEE, FEDERAL HOME LOAN BANK BOARD

STATEMENT CONCERNING JURISDICTION

The jurisdiction of the District Court in the litigation from whence this present attempted appeal is prosecuted, Beverly Hills Federal Savings & Loan Association v. Federal Home Loan Bank Board, et al., Civil Number 62-305-FW, is based upon Section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. Section 1464(d)(1) and the Federal Declaratory Judgments Act, 28 U.S.C. Section 2201, 2202, [See Amended and Supplemental Complaint for Declaratory Judgment, Injunction and Other Relief (Tr. I, 36)], as well as Answer, Counterclaim and Cross-Claims filed by Appellee, Federal Home Loan Bank Board and

the respective answers thereto by the respective parties [See Tr. I, 42; Tr. I, 78; Tr. I, 75; Tr. I, 102; Tr. I, 87; Tr. I, 90; Tr. I, 93; Tr. I, 99; Tr. I, 72.]¹

Jurisdiction of this Court of Appeals has attempted to be invoked by Appellants pursuant to 28 U.S.C. Sections 1291 and 1294.²

STATEMENT OF THE CASE

On January 26, 1962, the Federal Home Loan Bank Board adopted Board Resolution Number 15,430, pursuant to Section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended. This resolution recited certain improper actions on the part of various enumerated parties including specifically all of the Appellants. In accordance with the statute, the persons upon whom the resolution was served (all appellants were served individually) were given thirty (30) days within which to correct their violations of law and the regulations of the Federal Home Loan Bank Board (Tr. I, 8).

Within the thirty day period, Beverly Hills Federal Savings & Loan Association (one of the parties served with the aforereferenced resolution) filed in the United States District Court for the Southern District of California a Complaint for Declaratory Relief and named as the sole defendant, the Federal Home Loan Bank Board. This Complaint pres-

¹ Appellants on page 18 of their Brief refer to a Second Amended and Supplemental Complaint, filed by Appellee, Beverly Hills Federal Savings & Loan Association; this is not part of the record of this appeal and further occurred subsequent to the action herein sought to be revived and accordingly will not be treated in this brief.

² Pursuant to this Court's Order of November 23, 1965, the issue of appellate jurisdiction has been reserved to await a hearing on the merits. Appellee, Federal Home Loan Bank Board specifically adopts and makes a part hereof all reasons advanced previously which demonstrate the lack of appealable interest of Appellants.

ented the sole issue of the present status, rights and duties of the then directors of the Federal Association and the legality of their election. (Tr. I, 2).

On March 30, 1962, the Federal Home Loan Bank Board adopted Resolution Number 15,703 (Tr. I, 27), which set forth specific charges against each of the Appellants herein, as well as against all other parties previously served with Board Resolution Number 15,430. On April 7, 1962, the defendant, Federal Home Loan Bank Board filed a Motion to Dismiss the Complaint for Declaratory Relief and submitted as a basis therefor, *inter alia*, that the entire controversy had not been presented to the Court since issues presented in Board Resolution Number 15,430 were not presented by such action. On April 23, 1962, United States District Judge Carter denied the motion of the defendant, Federal Home Loan Bank Board to dismiss the complaint and granted the motion of the plaintiff, Federal Association for leave to file an amended and supplemental complaint and for an order adding all interested parties.³

The Amended and Supplemental Complaint for Declaratory Judgment, Injunction and Other Relief was filed by the plaintiff, Association on April 23, 1962 (Tr. I, 36). The Association incorporated both Board Resolutions, previously referred to as Exhibits 1 and 2 to their plead-

³ The argument made to the Court in regard to indispensable parties in the motion to dismiss the Complaint for Declaratory Relief was of an alternative nature to the argument previously referred to in the above. Specifically, it was argued that since the Board Resolution 15,430 raised the issue of each of the named appellants' right (as well as certain other named persons) to hold office in Beverly Hills Federal as well as their right to serve in a fiduciary capacity in the future, such matters should not be adjudicated without their presence (See paragraph 12(b) of Amended and Supplemental Complaint), Judge Carter specifically rejected this argument. The Appellee Board regrets the necessity to refer to matters outside the record of the appeal. Such references are necessitated by the repeated reference by Appellants to matters outside the record.

ing (See Par. 10, 11 of the Amended Complaint, Tr. I, 39), and specifically incorporated all controversies alleged in such Resolutions to be adjudicated by the court below, (See first prayer for relief, Tr. I, 41). Contrary to the assertion of Appellants in their statement of the case, (top of page 3 and a part of their opening brief), where it is contended that "no cause of action was stated against these new parties", the Amended and Supplemental Complaint in paragraph 12(b) clearly joins all defendants other than the Federal Home Loan Bank Board to the real and existing controversy set forth in paragraph 11 thereof. Appellants in their Answer to the Amended and Supplemental Complaint prayed that the Court adjudicate and declare their rights, duties, obligations and status as they relate to matters asserted by both plaintiff, Association and defendant, Federal Home Loan Bank Board.

It is to be noted that subsequently no motion was made in accordance with Rule 12(b) of the Federal Rules of Civil Procedure to dismiss for lack of jurisdiction of the person by any party joined and that no such defense was raised in the responsive pleading of any of the parties in accordance with Rule 12(b). Additionally, the Federal Home Loan Bank Board filed individual Cross-Claims against each of the named Appellants herein. Again, the Appellants did not file any 12(b) motions but rather answered individually these Cross-Claims and admitted jurisdiction.

In an endeavor to support their respective positions and to bring the action below to its earliest possible conclusion, the Appellee, Association, the Lytton Appellees and the Appellee Board utilized vigorous discovery. The Appellee, Association caused depositions to be taken of savings and loan executives from San Antonio to San Francisco and from St. Paul to Pittsburgh. Pursuant to exhaustive Interrogatories filed by the Lytton Appellees, the Appellee Board was required to prepare two volumes of Answers containing literally thousands of entries. Additionally, the Appellee Board took the depositions of the Appellee,

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Bart Lytton and two of the executives of the Appellee, Lytton Financial Corporation, as well as of the Appellants, Eugene Webb, Jr. and Richards Matthews, Jr. Additionally, the Appellee Board sought and obtained production of documents through the use of subpoenas *duces tecum*. Throughout these discovery proceedings, there was a marked absence of the Appellants or their counsel from the depositions taken by the Appellee, Association. Counsel for the Appellants, Mr. Pollock, only appeared at the depositions of the Appellee, Bart Lytton and the two executives of the Appellee, Lytton Financial Corporation, which were taken in California, in addition to appearing to represent the two Appellants, who were deposed.

After the litigation was in progress, beginning less than a year after its inception, the Lytton Appellees successively and continually explored ways and means to end the litigation as far as the Appellee, Association and the Appellee Board were concerned. The Appellee Board in connection with any settlement with the Lytton Appellees had one basic notion in mind, as former Chairman McMurray so well explained in his deposition (McMurray Deposition, 41-43, 58-60, 123-177), the first deposition taken by the Appellants in this litigation, which was not taken until March, 1965. Thus, so far as the Lytton Appellees were concerned, the requirement of the Appellee Board from the very beginning or its basic principle, as former Chairman McMurray phrased it, was a complete change in the directors of the Association with the end result of a public interest board of directors being in charge and control of the Appellee, Association, so that it would finally be returned to its proper owners, the members of the Association.

Thus, during the course of the action in Federal Court, never was there any attempt made by the Appellants to settle the litigation from their viewpoint, whether or not they were aware of the Lytton Appellees' repeated offers of settlement.

When the Appellee, Bart Lytton, in December, 1964 suggested a pos-

sible settlement to former Chairman McMurray and agreed that a basic point of any such proposed settlement would be the submission of his resignation and the resignation of all the then present directors of Beverly Hills Federal Savings & Loan Association, the Appellee Board saw that Mr. Lytton and the Lytton defendants were willing to meet the Appellee Board's basic principle as to a settlement with them. Accordingly, acting in the public interest of saving the time and energies, not only of a governmental agency but also of the Federal Association, which would inure to the benefit of the public generally and the members of the Appellee, Association specifically, and after exhaustive negotiations conducted by, and modification as required by, the Appellee Board (McMurray Deposition, 108, 110), the Appellee Board with the Appellee, Association and the Lytton Appellees reached a settlement which was properly approved by District Judge Whelan on January 14, 1965. The Appellants, the Webb defendants below, then moved to set aside the settlement or in the alternative to require the District Judge to dismiss them.

The Webb defendants contended that they had been "left holding the bag" (Tr. I, 164) because they were not part of the settlement, although from the inception of the litigation they had never indicated any desire or willingness to effectuate a settlement. Counsel for the Lytton defendants at bar in essence defined the phrase "left holding the bag" as the Appellants' counsel's "dismay at being no longer able to count on the other defendants to take depositions throughout the country and otherwise carry the burden of the case for him," which was "doubtless a disappointment" (Tr. IV, 23). Realizing that the dismissal of other Appellees in no way affected the defense of the Appellants of their own unlawful conduct in the sale of Beverly Hills Federal Savings & Loan Association, District Judge Whelan properly refused to grant the relief requested by the Appellants in their motion to dismiss and it is from

his dismissal that Appellants are attempting to prosecute this appeal.

Lastly, the Appellee Board does not wish to burden the Court with matters outside of the record, as raised by the Appellants in their statement of the case. However, the Appellee Board desires to call the Court's attention to page 3 of Appellants' Brief where it is asserted that Eugene Webb, Jr. desiring to relieve himself of his responsibilities made arrangements with the Attorney for Lytton to have him become President and General Manager of Beverly Hills Federal Savings & Loan Association.

While true that such arrangements were finally made, it should be said that Eugene Webb, Jr. in his deposition of October 27 thru November 6, 1963 testified freely that many contacts, approaches, conversations and negotiations took place over a considerable period of time with both individuals, such as Richards Matthews, Jr., a co-defendant in this case, and also representatives of several savings and loan holding companies with the objective of selling the Association to their respective companies.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court below erred in dismissing the Appellees, who were defendants and cross-defendants below, Lytton Financial Corporation, Beth Lytton, Bart Lytton, Thomas W. Clarke, H. P. Braman and Glenn Wilson?
2. Whether the Court below erred in not dismissing the Appellants?
3. Whether the Court below erred in granting an Order and Judgment of Dismissal to the Lytton Appellees, the Appellee, Association and the Appellee Board, based upon a Stipulation and Covenant Not to Sue, in which the Appellants were not involved and where such Order and Judgment preserved the rights of the Appellants?

ARGUMENT

I. SUMMARY OF ARGUMENT

The Court below did not err, as contended by Appellants, in granting an Order and Judgment of Dismissal to the Lytton Appellees, the Appellee, Association and the Appellee Board, based upon a Stipulation and Covenant Not to Sue, in which the Appellants were not involved and where such Order and Judgment preserved the rights of the Appellants.

The controversy below was not bottomed on a theory of a conspiracy between the Appellants and the Lytton Appellees, as can be seen from an examination of the pleadings before this Court. Even assuming for the purposes of argument that this were not the case, there is no inherent bar to dismissing one or more co-conspirators and continuing the action against the remaining defendants. Further, even assuming the existence of the conspiracy charged, it is manifest from the pleadings that each and every Appellant has been charged with individual and specific acts of wrongdoing, for which they are accountable, separate and apart from any theory of conspiracy.

Lastly, there was no impropriety involved in the settlement under review. The record in regard to this settlement is complete and clear. It was a settlement which in fact and law did not alter or affect the rights of the Appellants, but on the contrary was restricted to a settlement between the Lytton Appellees, the Appellee, Association and the Appellee Board, which resulted in the return of the Association to the status of pure mutual Association under the guardianship of public interest directors and effectively prohibited the Lytton Appellees from participating in the control of the Association for a period of three years.

II. IT WAS NOT IMPROPER FOR THE COURT BELOW TO DISMISS THE LYTTON APPELLEES WITHOUT DISMISSING THE APPELLANTS

A. The Controversy Presented in the Suit at Bar Is Not Bottomed on the Issue of a Conspiracy

An examination of the pleadings before the Court in the action appealed from clearly demonstrates by their very nature and volume that the wrongdoing of the Appellants is not essentially bottomed on any theory of conspiracy between the Appellants and the Lytton Appellees.

Charge I(a) of Federal Home Loan Bank Board Resolution No. 15,703, dated March 30, 1962 (Tr. I, 29) charges violation of their fiduciary duties to the other Members of Beverly Hills Federal Savings & Loan Association by all the Appellants by taking advantage to further their own interests for good and valuable consideration and they failed to disclose the nature of such consideration and to reveal all material and relevant facts to the other members of the Appellee, Association.

Charge II(c) charges that Appellants, Eugene Webb, Jr. and Marguerite R. Webb violated §544.5 of the Regulations of the Federal Home Loan Bank Board and Section 4 of the By-Laws of Beverly Hills Federal Savings & Loan Association when they attempted to conduct a directors' meeting of the Association and to transact business without a quorum being present on or about March 14, 1961 at 1:30 P.M. at Title Insurance and Trust Company.

Charge II(d) charges that Appellants, Rufi and Jones, violated this same section of the Regulations as aforesaid and the same section of the by-laws when they participated in this meeting and transacted most important business, namely, an election to fill vacancies in the Board of Directors without a quorum and knowingly allowed Eugene Webb, Jr. and Marguerite R. Webb, interested directors, to participate in this meeting.

Charge II(e) charges the Appellant, Richards Matthews, Jr., with violating his fiduciary duties of loyalty and good faith to the members when he resigned his directorship as part of an agreement with the other Appellants to elect and maintain certain persons as officers and directors, as referenced in paragraphs II(c) and (d), *supra*, and allowed this election to take place without a quorum present and "without his taking action consonant with his duties owed to the other members of the Association as a director."

Charge II(f) charges that all the Appellants violated their fiduciary responsibilities of loyalty and good faith to the shareholders by participating in the furtherance and accomplishment of an agreement by certain directors to elect and maintain designated persons in office as officers and directors of the Association, "which was against public policy and accordingly void, and all said participating directors acted with the knowledge of said unlawful agreement."

These Charges, *inter alia*, contrary to the statement made by appellants on page 3 of their opening brief that "no cause of action was stated against these new parties", were incorporated along with the remainder of these Resolutions in the First Amended and Supplemental Complaint of the plaintiff, Beverly Hills Federal Savings & Loan Association (Para. 10 & 11, Tr. I, pp. 38-39). The Webb defendants were by paragraph 12 of this pleading "joined as parties defendant, subject to the authority of the court to treat them as plaintiffs or defendants as may become appropriate in the conduct of this litigation" (Tr. I, p. 40). In the first prayer for relief, the plaintiff, Association (Appellee, Association herein) asks "That the Court adjudicate and declare the rights, obligations and status of plaintiff and of each of the defendants with respect to the controversies hereinabove alleged and order the performance of any and all obligations found to exist on the part of any such parties" (Tr. I, p. 41). Substantially the same relief was prayed for by appellants in their Answer to the First Amended and Supplemental Complaint.

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Prior to the Settlement here under attack, other than in the Resolutions above discussed where were the real meats of the charges against the plaintiff, Association, the Webb defendants and the Lytton defendants to be found? The answer to this question is simple and need consume less than a line, — in the Answer, Counterclaim and Cross-Claims of the Federal Home Loan Bank Board.

An examination of this pleading shows the vital and independent role played by the Webbs in this overall transaction. It shows, for example, from a statistical viewpoint that there were two cross-claims levelled at the defendant, Eugene Webb, Jr. and two Cross-Claims levelled against his wife, the Chairman of the Board of the Association, the defendant, Marguerite R. Webb.

In the first Cross-Claim against the Appellee, Eugene Webb, Jr., after setting forth the jurisdictional allegation in the first paragraph thereof, the defendant below and appellee here, the Federal Home Loan Bank Board (hereinafter referred to as Appellee Board) realleged eleven subparagraphs of paragraph eleven of its Answer as paragraphs two through twelve of the Cross-Claim. After the full delineation of the facts involving the unlawful actions of this Appellant, in paragraph thirteen of the Cross-Claim, the Appellee Board alleged that "his unlawful actions" demonstrated "a pattern of lack of responsibility for law and regulation of the Federal Home Loan Bank Board and his duties as a director of a Federal Savings & Loan Association". (Emphasis supplied.) The final paragraph of this Appellee's First Cross-Claim against Appellant, Eugene Webb, Jr., alleges that he "acted with full knowledge of the unlawfulness of the actions charged . . . and acted in extreme disregard of such unlawfulness."

There is further a second Cross-Claim against Eugene Webb, Jr., where with allegations incorporated again from paragraph eleven from the Answer of Appellee Board fourteen paragraphs are required to demonstrate that the wrongful and unlawful sale of proxies and director-

ships of plaintiff, Association was "in willful, deliberate and extreme disregard for and in violation of the fiduciary duties owed by defendant, Eugene Webb, Jr."

Before discussing the Cross-Claims against the other Webb defendants, for example, as we shall set forth herein, *infra*, there are two Cross-Claims levelled against the defendant, Marguerite R. Webb, a comparison is made between the two Cross-Claims, discussed, *supra*, against Eugene Webb, Jr. and whatever claims were made by Appellee Board against the individual alleged by Appellants to be a "co-conspirator", Appellee, Bart Lytton. Turning, therefore, to the Cross-Claim against "Defendant Bart Lytton", which follows the Cross-Claims against all the Webb defendants, we find that only five paragraphs were required, including the jurisdictional paragraph, with no reference back to paragraph eleven of the Answer of the Appellee Board to allege a demonstration of the "lack of responsibility" on the part of the Appellee, Bart Lytton, "for law and Regulations of the Federal Home Loan Bank Board, and his duties as a director of the Plaintiff, Association."

The reason for this difference in the methodology of these allegations, made by the Appellee Board over two and one-half years prior to the settlement with the Lytton Appellees is that there was no allegation of conspiracy between the Appellants and the Lytton Appellees set forth in its pleading or in its resolutions prior thereto. The language of Appellants' counsel on page ten of the "Opening Brief" to the effect that in its pleading the Appellee Board's "charges actually allege a conspiracy although that term is never used" is proved inaccurate by the very language and format of the Answer, Counterclaim and Cross-Claims of the Appellee Board. The charges in fact never allege a conspiracy but in fact set forth everything that the Appellant, Eugene Webb, Jr., and his fellow Appellants did in order that the Appellants might profit by the Association being purchased by another group. While the lengthy deposition of the Appellant, Eugene Webb, Jr., is not a part of the record before this

Court, in it he has clearly indicated that he discussed with others his proposed "retirement" and accompanying financial arrangements before he began his discussion with the man whom he knew to be, as the language is used in the Appellants' Opening Brief "at the time an attorney for Lytton," Thomas W. Clarke. It is interesting to note that a number of these people, at least one of whom was a representative of a savings and loan holding company, did not take advantage of this opportunity.

In the light of the above, the Appellee Board desires to call the Court's attention to the Appellants' Statement of the Case in their Opening Brief, where on page 3 thereof, the comments made about the Appellant, Eugene Webb, Jr., wanting to retire and arranging his succession assume an entirely different character and are shown to be a distortion of the true facts. This is, of course, aside from the fact that the statements made in that particular paragraph in the Opening Brief of the Appellants form no part of the record of this appeal and have no bearing thereon.

Since Appellants have elected on page 4 of their Opening Brief to include other occurrences relating to the transfer of management of the Association that form no part of the record on this appeal and since they are inaccurately related, Appellee Board has no recourse but to attempt to set the record straight by referring to depositions not included in the record. Appellants contends that it was at Thomas W. Clarke's insistence that Webb agreed to transfer the proxies, whereas it is evident from the Appellee, Bart Lytton's deposition and also from Appellant, Eugene Webb, Jr.'s deposition that it was Mr. Lytton who insisted on such a prerequisite condition before purchasing the Southland Company.

Appellants further state that Mr. Lytton moved in "about a year later", but this is just not in accord with the facts. Appellee, Bart Lytton, was elected Chairman of the Board less than five months after the

initial transfer took place and contrary to the impression that he took over from one H. P. Braman is the fact that Mr. Braman, as President, never was the Chief Executive Officer of the Association, but at all times second in command to the Chairman of the Board.

On page 5 of their Opening Brief, Appellants state that "Bank Board examiners were in nearly constant attendance at Beverly Hills [Federal Savings & Loan Association] up to the date of the Judgment complained of on this appeal." While not pertinent to the appeal and forming again no part of the record, we ask the indulgence of this Court and refer to Appendix E of our brief which consists of a copy of an Affidavit, filed by the Director of the Office of Examinations and Supervision of the Federal Home Loan Bank Board as part of another motion filed in oppositions to Appellants in the District Court in which a similar contention was made. Even a cursory reading of the Affidavit completely refutes their allegation.

The next item Appellee Board must take issue with is the statement, again on page 5 of the Appellants' brief, that this action "dragged along." There was continuing, expensive and exhaustive discovery in this action, although not actively participated in at that time by the Appellants, that required the efforts and time of numerous attorneys and other experts. Interrogatories that the Appellee Board were required to prepare alone required the efforts of over twenty-five (25) Examiners over an extended period of time and cost in excess of \$100,000.00. And depositions were taken the length and breadth of this Republic and again it must be stated, and we must beg the Court's indulgence in this since we are only answering matters that Appellants have seen fit to raise, that the Appellants in all of the depositions taken by the Appellee, Association did not take an active part by having representatives present.

While we have answered a number of misleading or inaccurate statements and in the process have burdened this Court with various

references and facts to correct them, we have by no means attempted to challenge directly all such statements in Appellants' Opening Brief. But as a final matter we submit the following inaccuracy: On page 3 of Appellants' Opening Brief, it is contended that Federal Associations were forbidden by their Charters to engage in the activities for which Appellant, Eugene Webb, Jr., had organized the Southland Company. In Appendix C, the Court may examine the Board's ruling as to a Federal Association's prerogative to handle their own escrows and under certain circumstances escrows for others. The Federal Association may also service its own loan and loans sold to others [12 C.F.R. §§ 545.11, 545.15 and 555.4(b)].

In order adequately to set forth similar independent charges against the remaining Webb Appellants, two Cross-Claims totaling twenty-seven paragraphs were required to precisely set forth the charge against Appellant, Marguerite R. Webb, the wife of Appellant, Eugene Webb, Jr., and the Chairman of the Board of Beverly Hills Federal Savings & Loan Association when it was illegally sold. Three additional Cross-Claims were filed against Richards Matthews, Jr., Robert G. Ruff and Eugene C. Jones, similarly setting forth individual violations of fifteen to sixteen paragraphs in each Cross-Claim.

All the Appellants in their Answers to the above-described Cross-Claims specifically admitted personal jurisdiction and denied any and all violations charged. This Honorable Court unequivocally upheld the Board's right and power to maintain all of these Cross-Claims under discussion. *Reich et al. v. Webb, et al.*, 336 F.2d 153 (9th Cir. 1964), *cert. den.* 380 U.S. 915 (Oct. Term, 1964).

B. Assuming for Purposes of Argument That a Charge of Conspiracy Between the Appellants and the Lytton Appellees May be Read Into the Pleadings Before the Court Below, the Appellants Can Be Sued Alone as Defendants.

Even if it were assumed for the purposes of argument that a charge of conspiracy is to be read into the controversy under consideration, the Appellants were not required to be dismissed by Judge Whelan merely because of a settlement among the Lytton Appellees, the Appellee, Association and the Appellee Board. Although the entire body of citations of the Appellants is directed to this point, it is submitted that none of these authorities sustains such a conclusion as advanced by Appellants.

The authorities cited by Appellants may be divided into two broad categories. The first are cases which articulate the principle that an allegation of a conspiracy is defective if it merely alleges that a corporation acting through its agents, servants or employees had conspired for the reason that, unless there was an allegation to indicate that the agents of the corporation were acting in other than their normal capacities, the requirement that there must be two or more persons or entities to have a conspiracy is not fulfilled. *Packaged Programs v. Westinghouse Broadcasting Co.*, 156 F. Supp. 76 (D.C. W.D. Pa., 1957); *Johnny Maddox Motor Co. v. Ford Motor Co.*, 202 F. Supp. 103 (D.C. W.D. Tex., 1960); *April v. National Cranberry Association*, 168 F. Supp. 919 (D.C. Mass., 1958) (cases involving allegations of violation of the Sherman Act). *United States v. Carroll*, 144 F. Supp. 939 (D.C., S.D. N.Y., 1956) involved a criminal action for conspiracy to use and acquire gold in violation of the gold laws of the United States. The court dismissed the conspiracy charges for lack of evidence regarding any participants other than one defendant and the corporation he dominated which was used to carry out the alleged wrongdoing.

The second category of cases appear to apply to some degree the same principle as was discussed above to factual situations markedly distinct from the fact pattern before this Court.

Keppleman v. Upston, 84 F. Supp. 478 (D.C., N.D. Calif., S.D., 1949) presented a situation, — to use the District Judge's own words — which was "at once startling, anomalous and unusual." Plaintiff was an Air Force Sergeant who sued certain Air Force Officers and one civilian, whether this civilian was employed by the military or connected with them in any way is not entirely clear. In a four count complaint for damages, the first two counts alleged that the military defendants were instrumental in effecting the false imprisonment of plaintiff upon unfounded charges of embezzlement. Counts three and four alleged that all defendants engaged in a conspiracy against plaintiff whereby they were responsible for a plaintiff's false confinement.

The suit was commenced in a California State Court and transferred to the United States District Court in conformance with federal statutes covering suits brought against military officers in state courts. The court noted that the suit could not have been brought originally in Federal Court and that the plaintiff's cause of action and right to relief are grounded upon state law. A jury was selected and impaneled and counsel for both sides had made their opening arguments when "the United States Attorney presented to this Court a motion to dismiss on behalf of the defendants." This motion presented the initial question of "whether this tribunal has jurisdiction in such a . . . case to grant the relief sought by the plaintiff." It was observed that "[t]he basis for plaintiff's suit is the allegedly false statements made by defendants, which led to his arrest, imprisonment and charge of having embezzled certain army funds." Damages were alleged to flow from the action of making these false statements. The Court determined that in order to entertain the cause and to award plaintiff damages, "it must of necessity examine into the propriety of the Court Martial charges preferred

by defendants, and all the proceedings leading up to the imprisonment of plaintiff, and his eventual release from confinement." (*Ibid.*, at 479.)

Before making any examination of the issue involved the Court referred to the line of demarcation between civil and military authority, stating "indeed, assuming that plaintiff had been convicted by the Military Court, and sought to review the matter before this Court on habeas corpus, our authority would be limited to the isolated issue of jurisdiction on the part of the military tribunal." (*Ibid.*, at 479.)

The Court stated further that the "[p]laintiff had not challenged the jurisdiction of the Army authorities in instituting the proceedings. . . . Were this Court, sitting with a jury, to assume jurisdiction, a chaotic condition would be created, without support either in authority or reason." (Emphasis supplied.) From this the Court reasoned that if the judgment of the Court Martial could not be reviewed, the Court could not inquire into the motives or considerations which entered into the initiation of the charges in the first instance. The Court also additionally proposed an insoluble problem "[h]ow, also, in a civil suit for damages, can the District Court grant relief which must, perforce, be based on the regularity of an Army Court Martial proceeding, the jurisdiction of which had not been challenged?" (*Idem.*)

In citing *Cooper v. O'Connor*, 69 App. D.C. 100, 99 F.2d 135, 138, setting forth the rationale of the policy of law protecting an officer's duties from harassment of civil litigation, the Court remarked: "This language applies with equal force to both civilian and military officers performing their official duties." (*Ibid.*, at 480.)

Additionally, the Court relied on an entirely separate line of non-Federal authorities, which were found to spring from Section 472 of the Military Code of the State of California. This statute provided in essence that no officer ordered by a military court or an officer or person acting under its authority shall be liable, civilly or criminally, for

any such act done in such capacity. Lastly, the Court took judicial notice that the war emergency had not yet been declared at an end. The Court ordered that the complaint be dismissed with prejudice based on the "grounds of lack of jurisdiction and defendants' immunity from liability". (*Idem.*)

It is in this context that a one paragraph reference without authority was made by the Court that the civilian defendant was named only in the third and fourth counts, dealing with the alleged conspiracy. "In the very nature of things, a person cannot conspire with himself. Since the Court is prepared to make its order of dismissal as to the military defendants, it will accordingly make a similar order with respect to the civilian defendant." (*Idem.*)

The case of *Reitmeister v. Reitmeister, et al.*, 162 F.2d 691 (2nd Cir., 1947) was a civil action initiated by virtue of a three count complaint. The first count involved only one defendant, Louis Reitmeister for "intercepting and publishing" two telephone calls. The second count was against Reitmeister and two other defendants charging all three with a conspiracy to "goad" the plaintiff into telephone talks which defendants would thereafter "publish". The third count was directed at all of the defendants for publicly divulging the two telephone conversations in the Surrogate Court for Queens County, New York.

At the conclusion of plaintiff's evidence, the trial judge dismissed the second and third counts but submitted the first count to the jury which in turn brought in a verdict for defendant. In regard to the dismissal of the second count the Circuit Court after a review of plaintiff's evidence upheld the propriety of the trial judge's action and then stated:

But even assuming that it was an error for the judge to dismiss the second count at the time he did, we should not reverse the judgment in the posture of the case as it now stands . . . from the way that the judge left the case to the jury, they must have found

that the plaintiff had 'authorized' the 'publishing' complained of, which would be a good estoppel as to Louis [Reitmeister] in a new trial upon the second count. Now it is as much a rule governing a civil action for conspiracy as a criminal prosecution, that there must be two conspirators, so that upon a new trial upon the second count, a dismissal would be inevitable. (At pages 695-696.)

In a review of the third count, it was stated by Circuit Judge L. Hand, who although speaking for the Court was also dissenting in part (Circuit Judges Chase and Clark also writing concurring opinions):

The third count alleged that all six of the defendants had jointly 'published' the 'intercepted' messages by playing the records in the Surrogate's Court. The plaintiff did not connect either Hopp or Phillips with this 'publishing' and as to them the dismissal was clearly right. Since the judgment upon the first count was in favor of Louis, as in the case of the second count, upon any new trial that judgment will be a good bar or good estoppel, so that as to him also the judgment must now be affirmed. So far, my brother Clark and I are in agreement, but he believes for the reasons stated in his opinion that the dismissal of the third count was also right as to the Lippmans and Nachby. Hence it follows that all three of us agree — although for different reasons — that the judgment should be affirmed on the first and second counts and on the third count as to Louis, Hopp and Phillips; and that two of us — Judge Chase and Judge Clark — think that the judgment on the third count should be affirmed as to the Lippmans and Nachby also, although again for different reasons. I am alone in thinking that the judgment on that count should be reversed as to them and for the following reasons. Although at the close of the plaintiff's case it did not appear how they became acquainted with the 'contents' of the records, it was a fair, I might even say inevitable, inference that they must have become so thru Louis,

directly or indirectly . . . As I read the statute, anyone who becomes 'acquainted' with the 'contents' of an 'intercepted' message, may not 'publish' it if he knows that it has been 'intercepted' . . . (*Ibid.*, at 696).

Judge Hand went on to state that the records on their face portrayed that the talks had been intercepted and put upon the Lippmans and Nachby the duty of going forward with the proof that the plaintiff as "sender" had consented. Judge Hand also pointed out that these two defendants could not avail themselves of the judgment in *Louis Reitmeister* 's favor on the first count, although it protected him individually.

. . . They were by hypothesis joint tort-feasors with him and except in exceptional cases joint tort-feasors are not 'in privity.' Maybe on a trial they could prove that the case at bar was one of the few situations in which the opposite is true, and I would leave that open; but on this record it was otherwise. The fact that as to Louis [*Reitmeister*], it must be assumed that the plaintiff consented does not mean that he consented as between himself and the Lippmans and Nachby. (Incidentally, the third count is not for a conspiracy and the rule peculiar to that kind of suit does not apply; indeed, it would make no difference anyway, because certainly Pearl Lippman and Nachby were jointly concerned in the 'publication' in the Surrogate's Court.) (*Ibid.*, at 696.)

Judge Hand went on to state in his opinion that the publication in the Surrogate's Court presented an issue upon which the trial judge should have taken a verdict.

Circuit Judge Chase in a concurring opinion held that he would affirm the judgment of the District Court on the ground that there was no interception of the telephone messages in violation of Section 605 of Title 47 of the United States Code and absent such unlawful interception, no issue of disclosure was properly before the Court.

Circuit Judge Clark concurring in the decision stated that in his opinion the authorization as found on the part of the plaintiff for the disclosure involved in the verdict for Louis Reitmeister was a consent that would inure to the benefit of persons such as the defendant who violate no duty to the plaintiff once it has been established that authorization was given to Louis Reitmeister.

. . . I think the principle is illustrated by Restatement Judgments, 1942, §99, under the caption, 'Where Liability of a Person Is Based Solely upon the Act of Another.' As Comment b states, the rule of the section, that a judgment on the merits in favor of the person committing the tort bars a subsequent action against another responsible for the conduct, does not apply if there is an independent basis of liability against such other person. But this cannot be the case here because, for reasons stated, the acts of the others were not tortious if Louis [Reitmeister] had [plaintiff's] Adolf's consent. (*Ibid.*, at 699.)

The Judge also observed in regard to harmless error as to the direction of the verdict that in his judgment there was no proof of any damages.

In the case of *Elliott v. Paramount Film Distributing Corporation*, 27 F.R.D. 495 (D.C., E.D., Penna., 1961), plaintiffs filed their complaint against six named defendants, comprising five motion picture distributors and one exhibitor. The complaint charged an illegal conspiracy between the distributors and the one exhibitor, whereby the distributor pursuant to a threatened boycott by the exhibitor conspired to give a key run and better clearance to the exhibitor's theatres than to plaintiffs' theatre, which the Judge found, although located in Philadelphia, were not in substantial competition. Motions to Dismiss were filed by the individual distributors and prior to disposition of such motions, the distributor defendants granted ". . ." to the plaintiffs the key run the plaintiffs requested and in consideration thereof and as a part of the settle-

ment the plaintiffs agreed to move this Court for an order dismissing this action as to the defendant distributors only.'" (*Ibid.*, at 495). Pursuant to this agreement, upon motion of the plaintiffs, an order was entered, which provided: "'that plaintiffs' claims against Paramount Film Distributing Corporation, . . . [all the other named distributors] are dismissed with prejudice.'" (*Ibid.*, at 495-496). The remaining defendant exhibitor moved to dismiss on a number of grounds, only one of which the Court considered. Specifically, the remaining defendant contended that the complaint should be dismissed upon the ground that the conspiracy charged was alleged to be a continuation and/or outgrowth of a conspiracy, which was adjudicated in *United States v. Paramount Pictures, Inc.* The defendant contended that since he was not a defendant in that litigation, he could not be a party to any conspiracy which was alleged in the complaint.

The Court determined that Goldman was not a defendant and that common sense dictated that as an exhibitor, itself, defendant, Goldman had nothing to distribute but rather depended on distributors for the product. The Judge observed that the distributor defendant is in no position to dictate a distributor defendant's policy on clearances. "The mere fact that in this very case the plaintiffs agreed to dismiss with prejudice against the distributors after the latter had consented to better clearances and clear runs for the [plaintiffs'] Fern Rock Theatre is evidence of this." (*Idem.*)

On page 15 of their brief, Appellants contend that the latter two cases are "on all fours" with our present case. It is submitted that on the contrary the dissimilarity is marked. In essence, the present case involves a Stipulation for Settlement and a Judgment of Dismissal which by their very terms do not affect, alter or change the rights or obligations of any of the parties remaining in said litigation *inter sese*. (Tr. I, 105-111; 112-113.)

Appellants rather are in the position of remaining defendants as

were the remaining defendants in *Broadway & Ninety-Sixth Street Realty Corporation v. Loew's, Inc.*, 23 F.R.D. 9 (D.C., S.D., N.Y., 1958), in which the District Court concluded that it was quite proper to dismiss part of the defendants in a motion picture anti-trust suit, to which the remaining defendants objected. The Court finding that the remaining defendants had no standing to object, stated that there was "no reason in law or justice why the moving defendants, having bought their peace from plaintiffs, should be required to continue as co-parties [in a litigation] with the objecting defendants and for their sole benefit." (*Ibid.*, at page 11.) See also *Southern Electric Generating Company v. Allen Bradley Company*, 30 F.R.D. 135 (D.C., S.D., N.Y., 1962), *Cf. Twentieth Century-Fox Film Corporation v. Winchester Drive-In Theatre, Inc.*, ___ F.2d ___ (9th Cir., decided October 22, 1965), in which this Court adopted the rule favored by the *Restatement of Torts*, Section 885(1) to the effect that a release of one tort-feasor releases all others jointly liable unless the release expressly reserves rights against the other.

Lastly, it should be observed that in the normal conspiracy situation, co-conspirators used legal means to accomplish an illegal objective. Of course, the nub of a Sherman Act offense in this regard is the illegality of the objective rather than the character of the means used. As clearly appears from a full reading of the pleading in issue in the present appeal, even assuming the existence of a conspiracy, the Appellants are charged with individual illegal actions for which they are individually responsible.

An appropriate example of the consequences of using illegal means to achieve an unlawful conspiratorial purpose can be seen in the case of *Volasco Products Company v. Lloyd A. Fry Roofing Company*, 308 F.2d 383 (6th Cir., 1962), *cert. den.* 372 U.S. 907. The complaint in that case presented three issues: (1) did the defendant conspire with one or more manufacturers to fix prices in violation of the Anti-Trust Laws; (2) did the defendant alone or in combination with other manufacturers

monopolize or attempt to monopolize by fixing prices on a discriminatory basis; and (3) did the defendant discriminate in prices on a geographic basis, the effect of which discrimination may have been to substantially lessen competition, create a monopoly or to injure, destroy or prevent competition in violation of the Anti-Trust Laws? Thus, the complaint presented issues under Sections 1 and 2 of the Sherman Act and Section 2(a) of the Clayton Act. A general verdict was returned by the jury in favor of the plaintiff. In review of this general verdict the Court of Appeals found that the trial judge's instruction to the jury on the law of conspiracy was correct and that the evidence presented was sufficient to take the case to the jury on that issue. However, the Court of Appeals found that the judge's instruction in regard to monopoly was not adequate and further there was no evidence of monopoly in the relevant area by the defendant individually. On a retrial of this case, it appears that the jury brought in a special verdict in which it was found that the defendant had violated Section 2(a) of the Clayton Act by discriminating in prices between the different purchasers. The judgment of the District Court was affirmed in *Volasco Products Company v. Lloyd A. Fry Roofing Company*, 346 F.2d 661 (6th Cir., 1965), *cert. den.*, No. 464, November 8, 1965.

III. THERE WAS NO IMPROPRIETY INVOLVED IN THE SETTLEMENT BETWEEN THE LYT- TON APPELLEES, APPELLEE, BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSO- CIATION, AND THE APPELLEE, FEDERAL HOME LOAN BANK BOARD.

In the process of attacking this Settlement, unwarranted and abusive attacks have been made upon the Trial Judge where he is accused of "conduct" not within the spirit of Canon 3 of the Canons of Ethics, as well as similar attacks on all counsel participating in this settlement including by name, Thomas W. Clarke, Esquire and by direct implica-

tion including Rodney K. Potter, Esquire of O'Melveny & Myers, as well as Special Counsel for the Board, the General Counsel of the Board, the then Chairman Joseph P. McMurray, Chairman John E. Horne and Board Member John deLaittre. Perhaps the most direct and appropriate answer to these charges, which were properly rejected by District Judge Francis Whelan as being unfounded, can best be presented by reference to Chairman McMurray's deposition, in which he explained in minute detail the philosophy of this settlement, as well as a repetition of what the record in this case reflects concerning the manner and technique of settlement.

In explaining the philosophy which permeated the settlement among the Lytton Appellees, the Appellee Association and the Appellee Board, former Chairman Joseph P. McMurray, now the President of Queens College in New York City, in his deposition of March 12, 13 and 15, 1965 made it clear that the Appellee, Bart Lytton, had attempted on several occasions prior to December, 1965 to effectuate a settlement with the Federal Home Loan Bank Board, and he recalled particularly that on one occasion the suggestion was made that control of Beverly Hills Federal Savings & Loan Association be transferred to a foundation, which Appellee, Bart Lytton, controlled (McMurray Deposition, pp. 40 ff). He indicated that this proposal was rejected.

Mr. McMurray explained that this was a supervisory problem and the basic principle laid down as a basis for compromise after it had gotten into litigation was that Lytton Appellees would be allowed to receive back their investment plus an allowance for taxes or a situation where they "would get out without a loss but without a profit". (*Ibid.*) He said that the Board "wanted to reverse the transaction which we felt was in violation of the Board's Rules and Regulations and the idea of fiduciary responsibility of the Board of Directors and its officers". (*Idem.*)

When Mr. Deutz attempted to press the witness by inquiring, "Wh

the Board was concerned that Mr. Lytton should get back the full amount that he had expended in this transaction", Mr. McMurray forthrightly replied that "the Board was not concerned that he got back what he expended", — the "truth of the matter" being "that the Board was indifferent to his [Lytton's] financial condition." (McMurray Deposition, pp. 58-60). Then he went on to respond in detail as to what the real philosophy of this settlement was:

. . . It was a case that took considerable time of the Board, considerable time of many people, and it costs the Board money for legal services, and it would continue to cost the Board money for legal services, and it would continue to cost the association an enormous amount of time and in our judgment an enormous amount of legal fees, and possibly other fees, to what extent public relations expenditures were used in connection or in relation to the case, I don't know. But the Board felt that we wanted to reverse the transaction which we felt was in violation of the Board's rules and regulations, and the idea of fiduciary responsibility of the Association's Board of Directors and its officers. We wanted to reverse this transaction. We would have preferred, and we believed, that if this case had gone to the ultimate decision we had confidence that we would have won. But you are a lawyer, . . . with more knowledge of the law and its history than I would have believed that a certain decision would eventuate which didn't eventuate.

So, while we did have confidence, we could not, of course, be absolutely certain. And also there would be much time and effort that would intervene.

And the Board felt that if we reversed the transaction, we would have deterred anybody else from doing likewise.⁴

⁴ It should be noted that as a provision of the Stipulation for Settlement, each and every one of the Lytton Appellees was prohibited from undertaking any "new or further solicitation of proxies thereof for a period of three (3) years from the date of the surrender of the said proxies . . ." (Tr. I, 108).

However, we did not want -- if he were to make any profit on it himself, or his associates make any profit, this might have given encouragement to someone else. We felt that there was no particular advantage for him making such an investment, entering into such a transaction, having gotten back three or four years later the amount he did put into this. And we realized that in any settlement, there is give and take, and that you never get entirely what you want. On the other hand, the other party does not get entirely what they want.

So, what was worked out, or what was mutually advantageous to the Board, to the Federal Association involved, and to Mr. Lytton -- and we also looked into this from the Board's standpoint of the Board's future operations and responsibilities as you can't separate it, it was all part of the total picture.

Counsel for the Appellants has persisted in pursuing *ad hominem* arguments and applied them to men who have endeavored to lead humble and worthwhile lives and said counsel has again in this same vein commented on page 6 of his brief that "the parties went out and in less than 24 hours rounded up a new Board of Directors chosen by the Bank Board". While it seems unfortunate to find the phrase "rounded up" extant in an Appellate brief, the connotation of "rounded up" and other comments about these directors is completely without foundation.

Looking at the record and their background it can be stated without contradiction, as shall be shown hereinafter, that the Appellee, Association is staffed with new officers and a Board of Directors composed of men well trained and experienced in banking, savings and loan, general business and legal activities. From the example of their past personal lives, it can only be concluded that they will act in the best interest of the members of the Appellee, Association.

Preston Silbaugh, a Director, Chairman of the Board of Directors and Chief Executive Officer of the Association comes to this

position with a superior record of Government service after having served as State Supervisor of Savings & Loan Associations in the State of California and in the international governmental field as a Member of the California-Chile Mission. He was known by former Chairman McMurray as a man who had carried out his duties as State Supervisor courageously and had "acted in a manner which was in the public interest". (McMurray Deposition, p. 119). Chairman McMurray, again speaking in his forthright manner, was most direct when he advised counsel for the Webb defendants why he chose Mr. Silbaugh in the following language:

. . . And he measured up to his responsibilities in my judgment. Whether you agree in detail with what he did, he certainly was honest, he certainly acted in what he thought was in the best interest of the public and courageously. I might say in many cases I disagreed with his specific action, but that didn't deter me from -- it didn't in any way change my attitude as to his character and integrity and I thought as a head officer of such an association he would act accordingly. And I thought from an image standpoint that the public would understand quickly that if you have a man who was known as a Commissioner, and so on . . . You always have to worry about the confidence of the people and what might happen. And I thought quickly that it would be obvious to everyone at once that he was worthy to entrust confidence in. (*Ibid.*, pp. 119-120.)

Former Chairman McMurray went to to say that this was not a new approach for him because in a supervisory case in the State of New York he had recommended to the board of directors of another Federal Association that the former Superintendent of Banks of the State of New York be named to the board of directors and this "proved to have a very favorable reaction from the general public in that area." (*Idem.*)

Kenneth Spencer, a Director, Vice-President and Chief Managing

Officer of the Association brought to his position, though a man comparatively young in years, a strong background in banking and savings and loan fields. He gained this experience in banking institutions before joining the Federal Home Loan Bank Board as an Examiner in its Boston District. He worked in the Boston District for several years and was highly regarded in this district to the extent that in early 1963 he was transferred to Washington in a more responsible supervisory position. Mr. McMurray describes him as "probably the most surprised person" when he approached him about serving as an officer of the Association, but as the former Chairman said, he was aware not only of Mr. Spencer's background but also because he knew from Mr. Spencer's having worked on the case in detail that he was very familiar with the background of this particular Association. He had also stressed that he had complete confidence "in him as a person, an industrious public-oriented kind of person."

Frank J. Breslin, Jr., a native Californian, whose father is a distinguished Internist in the Los Angeles area, brought to the Board of Directors not only a pertinent background in corporate, banking and business law, but after having been admitted to the bar, and prior to commencing the active practice of the law, he served as an executive in the International Banking field in South America with the National City Bank of New York, one of the major New York based banks having offices in South America.

Edgar Paul Boyko is a member of the Maryland, District of Columbia, California and Alaska Bars. He is a native of Austria who fled his native land after the arrival of the tyrant. Prior to coming to America he helped save lives during the Battle of Britain as the Chief Air Warden at Charing Cross Station in London. Originally, a chemist by profession, he turned to the law while in his twenties, and when a resident of Baltimore matriculated to the University of Maryland Law School. He finished No. 1 in his class and was elected to the Order of

the Coif. In 1945, he was No. 1 on the Maryland Bar Examination. Since his admission to practice in 1945, he has devoted his time both to public service and to the private practice of the law. He has served on the legal staff of the Bureau of Land Management in Washington, as its Chief Counsel in Alaska and as a member of the legal staff of the Office of Price Stabilization under Governor DiSalle during the Korean Emergency. In his deposition, former Chairman McMurray paid him a high compliment when he said, "When I was introduced to Mr. Boyko I questioned him somewhat on his background and . . . was extremely impressed by his brilliance and perception and understanding. (*Ibid.*, p. 122.)

The fifth member of the Board elected in January, 1965 was Mr. Harold Webb. Mr. Webb is a Captain, United States Coast Guard, Retired, who devoted a great portion of his life to the service of his country and the protection of its shores after his graduation from the United States Coast Guard Academy. Mr. Webb, who took his law degree at the George Washington University in Washington, D. C., served as the Legislative Representative of the Coast Guard in Washington and also served as Legal Officer for the First Coast Guard District in New York prior to his return to civilian life and his native California. Mr. Webb is a corporate executive in the management and construction field. Mr. McMurray was aware of the high standards of rectitude and administrative ability he had seen manifested by Mr. Webb when he had the opportunity to observe his legislative liaison activities exerted in behalf of the Coast Guard from the late 1940s to the mid-1950s.

In his deposition Mr. McMurray explained that a number of people were considered but were not requested to serve because of the fact that they were involved in activities which would be in conflict with their serving as directors of a Federal Savings and Loan Association. Mr. McMurray indicated that Rabbi Levine eventually came on the Board, which brought to the Board another individual

from a portion of the community about whose integrity there would be no question. (McMurray's deposition, p. 118).

It is suggested that the above background delineation clearly shows the type of men serving the Appellee Association, who will without doubt insure that this Association will be managed in accordance with the highest standards of mutuality.

It is manifest from an examination of the record in this case that the settlement which was accomplished was one intended to be and which, we submit, was in fact and in law between and concerning the Lytton Appellees, the Appellee Association and the Appellee Board. There was no intention to affect in any way the rights of the Appellants. This is clear from the philosophy of the settlement, as previously analyzed, the Stipulation of Settlement, the Judgment of Dismissal and statements of counsel in court contemporaneously with the consummation of the settlement. In fine, the intent of all the parties is manifest. The Appellants were to remain in the lawsuit with no enlargement or diminution of their rights or of the rights of the Appellee Association or of the Appellee Board.

CONCLUSION

For all of the reasons above set forth, Appellee, Federal Home Loan Bank Board respectfully submits that Judge Whelan properly refused to set aside the dismissal of the Lytton Appellees and properly refused in the alternative to dismiss the Appellants and accordingly, the Appeal should be dismissed.

Respectfully submitted,

RICHARD P. BYRNE,
MacCRACKEN, COLLINS & HAWES,
PHILIP R. COLLINS,
Special Counsel for Appellee,
Federal Home Loan Bank Board.

December 26, 1965.

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

PHILIP R. COLLINS.



APPENDIX A

HOME OWNERS' LOAN ACT OF 1933, AS AMENDED, 12 U.S.C., SECTION 1464(d)(1)

§ 1464. FEDERAL SAVINGS AND LOAN ASSOCIATION.

(a) *Organization authorized.*

In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

* * * * *

(d) *Proceedings to enforce compliance with law and regulations; grounds and procedure for appointment of conservators, etc.; powers.*

(1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in paragraph (2) of this subsection, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. It shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representation in Charge, a conservator or a receiver shall be exclusively as provided in

paragraph (2) of this subsection. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted by a hearing examiner as is provided by the Administrative Procedure Act. The Board or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpoenas and subpoenas duces tecum, and shall issue such at the request of any interested party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpoena or subpoena duces tecum and such courts shall have power to order and require compliance therewith. A record shall be made of such hearing and any interested party shall be entitled to a copy of such record to be furnished by the Board at its reasonable cost. After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with

respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, or by certified mail, to the Federal Home Loan Bank Board, Washington, District of Columbia.

APPENDIX B

CHARTER K (REVISED) AND BY-LAWS OF FEDERAL ASSOCIATION, TITLE 12, CODE OF FEDERAL REGULATIONS

§ 544.1

* * * * *

(b) *Charter K (rev.)*. If expressly requested in the Petition for Charter, or in the Application for Conversion into a Federal association, the Board, in lieu of Charter N, will issue a Charter K (rev.), reading as follows:

CHARTER K (REV.)

1. *Corporate title*. The full corporate title of the Federal association hereby chartered is.....
Federal Savings and Loan Association.....

2. *Office*. The home office shall be located at, in the County of, State of

3. *Objects and powers*. The objects of the association are to promote thrift by providing a convenient and safe method for people to save and invest money and to provide for the sound and economical financing of homes; and, in the accomplishment of such objects, it shall have perpetual succession and power: (1) To act as fiscal agent of the United States when designated for that purpose by the Secretary of the Treasury, under such regulations as he may prescribe, and shall perform all such reasonable duties as fiscal agent of the United States as he may require and to act as agent for any other instrumentality of the United States when designated for that purpose by any such instrumentality; (2) To sue and be sued, complain and defend in any court of law or equity; (3) To have a corporate seal, affixed by imprint, facsimile or otherwise; (4) To ap-

point officers and agents as its business shall require, and allow them suitable compensation; (5) To adopt bylaws not inconsistent with the Constitution or laws of the United States and rules and regulations adopted thereunder and this charter; (6) To raise its capital, which shall be unlimited, by accepting payments on savings accounts representing share interests in the association; (7) To borrow money; (8) To lend and otherwise invest its funds; (9) To wind up and dissolve, merge, consolidate, convert, or reorganize; (10) To purchase, hold, and convey real and personal estate consistent with its objects, purposes, and powers; (11) To mortgage or lease any real and personal estate and take such property by gift, devise, or bequest; and (12) To exercise all powers conferred by law. In addition to the foregoing powers expressly enumerated, this association shall have power to do all things reasonably incident to the accomplishment of its express objects and the performance of its express powers. It shall exercise its powers in conformity with all laws of the United States as they now are, or as they may hereafter be amended, and with all rules and regulations which are not in conflict with this charter now or hereafter made thereunder.

4. *Members.* All holders of the association's savings accounts and all borrowers therefrom are members. In the consideration of all questions requiring action by the members of the association, each holder of a savings account shall be permitted to cast one vote for each \$100, or fraction thereof, of the withdrawal value of his account. A borrowing member shall be permitted, as a borrower, to cast one vote, and to cast the number of votes to which he may be entitled as the holder of a savings account. No member, however, shall cast more than 50 votes. Voting may be by proxy. Any number of members present at a regular or special meeting of the members shall constitute a quorum. A majority of all votes cast at any meeting of members shall determine any question. The members who shall be entitled to

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vote at any meeting of the members shall be those owning savings accounts and borrowing members of record on the books of the association at the end of the calendar month next preceding the date of such meeting. The number of votes which each member shall be entitled to cast at any meeting of the members shall be determined from the books of the association as of the end of the calendar month next preceding the date of such meeting. Those who were members at the end of the calendar month next preceding the date of a meeting of members but who shall have ceased to be members prior to such meeting shall not be entitled to vote thereat. All savings accounts shall be nonassessable.

5. *Directors.* The association shall be under the direction of a board of directors of not less than 5 nor more than 15, as fixed in the association's bylaws or, in the absence of any such bylaw provision, as from time to time expressly determined by resolution of the association's members. Each director of the association shall be a member of the association, and a director shall cease to be a director when he ceases to be a member. Directors of the association shall be elected by its members by ballot: *Provided*, That in the event of a vacancy in the directorate, including vacancies created by an increase in the number of directors, the board of directors may fill such vacancy, if the members of the association fail so to do, by electing a director to serve until the next annual meeting of the members. Directors shall be elected for periods of 3 years and until their successors are elected and qualified, but provision shall be made for the election of approximately one-third of the board of directors each year.

6. *Withdrawals.* The association shall have the right to pay the withdrawal value of its savings accounts at any time upon application therefor and to pay the holders thereof the withdrawal value thereof. Upon receipt of a written request from any holder of a savings account of the association for the withdrawal from such account of all or any part of the withdrawal value

thereof, the association shall within 30 days pay the amount requested: *Provided*, That if the association is unable to pay all withdrawals requested at the end of 30 days from the date of such requests, it shall then proceed in the following manner while any withdrawal request remains unpaid for more than 30 days:

Withdrawal requests shall be paid in the order received and if any holder of a savings account or accounts has requested the withdrawal of more than \$1,000, he shall be paid \$1,000 in order when reached and his withdrawal request shall be charged with such amount as paid and shall be renumbered and placed at the end of the list of withdrawal requests, and thereafter, upon again being reached, shall be paid a like amount, but not exceeding the withdrawal value of his savings account, and until such withdrawal request shall have been paid in full, shall continue to be so paid, renumbered, and replaced at the end of the withdrawal requests on file: *Provided*, That when any such request is reached for payment, the association shall so advise the holder of such savings account by registered mail to his last address as recorded on the books of the association and, unless such holder shall apply in person or in writing for the payment of such withdrawal request within 30 days from the date of the mailing of such notice, no payment on account of such withdrawal request shall be made and such request shall be cancelled: *And provided further*, That the board of directors shall have absolute right to pay on an equitable basis an amount not exceeding \$200 to any holder of a savings account or accounts in any calendar month and without regard to any other provision of this section.

When the association is unable to pay all withdrawal requests within a period not exceeding 30 days from the date of receipt of written request therefor it shall allot to the payment of such requests the remainder of the association's receipts from all sources after deducting from total receipts appropriate amounts for expenses, required payments on indebtedness, earnings distributa-

ble in cash to holders of savings accounts, and a fund for general corporate purposes equivalent to not more than 20 percent of the association's receipts from holders of its savings accounts and from its borrowers. Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid and shall not become creditors.

7. *Redemption.* At any time sufficient funds are on hand, the association shall have the right to redeem, by lot or otherwise as the board of directors may determine, all or any part of any of its savings accounts on June 30 or December 31, by giving 30 days' notice of such redemption by registered mail addressed to the holder of each such savings account at his last address as recorded on the books of the association. The association may not redeem any of its savings accounts when there is an impairment of its capital or when it has any request for withdrawal which has been on file and unpaid for more than 30 days. The redemption price of each savings account redeemed shall be the full value thereof, as determined by the board of directors, but in no event shall the redemption price be less than the withdrawal amount of such savings account. If a savings account which is redeemed is entitled to participate in any reserve for bonus, the amount in such reserve for bonus which is properly allocable to such savings account shall be paid as part of the redemption price thereof. If any notice of redemption shall have been duly given, and if the funds necessary for such redemption shall have been set aside so as to be and to continue to be available for that purpose, earnings upon such account shall cease to accrue from and after the date specified as the redemption date and all rights with respect to each such account shall forthwith, after such redemption date, terminate, except only the right of the holder of record of such savings account to receive the redemption price thereof without earnings.

8. *Loans and investments.* The association may make any loan or investment authorized by statute and

the rules and regulations made by the Home Loan Bank Board and in effect on August 15, 1949; it may make such additional loans and investments as may thereafter be authorized by amendments of the said rules and regulations.

9. *Power to borrow.* The association may borrow money in an aggregate amount not exceeding one-half of its capital; the amount which may be borrowed from sources other than a Federal home loan bank shall not exceed one-tenth of such capital. Notwithstanding the foregoing limitations, the association may, with prior approval by the Federal Home Loan Bank Board, borrow from a Federal home loan bank or from any Federal agency or instrumentality without limitation, upon such terms and conditions as may be required by such bank or agency. The association may pledge and otherwise encumber any of its assets to secure its debts.

10. *Reserves, surplus, and distribution of earnings.* The association shall maintain general reserves for the sole purpose of meeting losses; such reserves shall include the reserve required for insurance of accounts. Any losses may be charged against general reserves. If and whenever the general reserves of the association are not equal to at least 10 percent of its capital, it shall, as of June 30 and December 31 of each year, credit to such reserves an amount equivalent to at least 5 percent of its net earnings for the 6 months' period, or such amount as may be required by the Federal Savings and Loan Insurance Corporation, whichever is greater, until such reserves are equal to at least 10 percent of the association's capital. As of June 30 and December 31 of each year, after payment or provision for payment of all expenses, credits to general reserves and such credits to surplus as the board of directors may determine, and provision for bonus on savings accounts as authorized by regulations made by the Federal Home Loan Bank Board, the board of directors of the association shall cause the remainder of the net earnings of the association for the 6 months' period to be distributed promptly

on its savings accounts, ratably, as declared by the board of directors, to the withdrawal value thereof, in lieu of or in addition to such net earnings, any of the association's surplus funds may be likewise distributed. Such net earnings shall be credited to savings accounts or paid, as directed by the owner. All holders of savings accounts shall participate at the same rate and on the same basis in the distribution of earnings: *Provided*, That the association is not required to distribute earnings on short-term savings accounts or on accounts of \$10 or less. Except as provided above, earnings shall be declared on all savings accounts of record at the close of each such 6 months' period, on the withdrawal value of each such account at the beginning of the said 6 months' period, plus the payments made thereon during such period (less amounts withdrawn, and, for purposes of participation in earnings, deducted from the latest previous payments), computed at the declared rate for the time invested, determined as provided below. The date of investment shall be the date of actual receipt of such payments by the association, unless the board of directors fixes a date, not later than the tenth of the month, for determining the date of investment of payments on savings accounts or designated classes thereof. Payments, affected by such determination date, received by the association on or before such determination date, shall receive earnings as if invested on the first of such month. Payments, affected by such determination date, received subsequent to such determination date, shall receive earnings as if invested on the first of the next succeeding month. Notwithstanding any other provision of its charter, the association may distribute net earnings on its savings accounts on such other basis and in accordance with such other terms and conditions as may from time to time be authorized by regulations made by the Federal Home Loan Bank Board. All holders of savings accounts of the association shall be entitled to equal distribution of assets, pro rata to the value of their savings accounts, in the event of

voluntary or involuntary liquidation, dissolution, or winding up of the association.

11. *Amendment of charter.* No amendment, addition, alteration, change, or repeal of this charter shall be made unless such proposal is made by the board of directors of the association, and submitted to and approved by the Federal Home Loan Bank Board, and is thereafter submitted to and approved by the members at a legal meeting. Any amendment, addition, alteration, change, or repeal so acted upon and approved shall be effective, if filed with and approved by the Federal Home Loan Bank Board, as of the date of the final approval of, or as fixed by, the members.

FEDERAL HOME LOAN BANK BOARD.

By
(Chairman)

Attest:

.....
(Secretary)

* * * * *

BYLAWS

§ 544.5 *Prescribed form.* A Federal association that has a Charter N or Charter K (rev.) shall operate under the following prescribed bylaws, unless and until such bylaws are amended in accordance with the procedure therein set forth:

1. *Annual meetings of members.* The annual meeting of the members of the association for the election of directors and for the transaction of any other business of the association shall be held at its home office at 2 o'clock in the afternoon on the third Wednesday in January of each year, if not a legal holiday, or if a legal holiday then on the next succeeding day not a legal holiday. The annual meeting may be held at such other time on such day or at such other place in the same community as the board of directors may determine. At each annual meeting, the officers shall make a full report of the financial condition of the association and of its progress for the preceding year, and shall outline a pro-

gram for the succeeding year. Annual meetings of the members shall be conducted in accordance with Roberts' Rules of Order.

2. *Special meetings of members.* Special meetings of the members of the association may be called at any time by the president or the board of directors, and shall be called by the president, a vice president, or the secretary upon the written request of members holding of record in the aggregate at least one-tenth of the capital of the association. Such written request shall state the purposes of the meeting and shall be delivered at the home office of the association addressed to the president. Special meetings of the members shall be conducted in accordance with Roberts' Rules of Order.

3. *Notice of meeting of members.* (a) Notice of each annual meeting shall be either published once a week for the two successive calendar weeks (in each instance on any day of the week) immediately prior to the week in which such annual meeting shall convene, in a newspaper printed in the English language and of general circulation in the city or county in which the home office of the association is located, or mailed postage prepaid at least 15 days and not more than 30 days prior to the date on which such annual meeting shall convene to each of its members of record at his last address appearing on the books of the association. Such notice shall state the name of the association, the place of the annual meeting and the time when it shall convene. A similar notice shall be posted in a conspicuous place in each of the offices of the association during the 14 days immediately preceding the date on which such annual meeting shall convene. If any member, in person or by attorney thereunto authorized, shall waive in writing notice of any annual meeting of members, notice thereof need not be given to such member.

(b) Notice of each special meeting shall be either published once a week for the two consecutive calendar weeks (in each instance on any day of the week) immediately prior to the week in which such special meet-

ing shall convene, in a newspaper printed in the English language and of general circulation in the city or county in which the home office of the association is located, or mailed postage prepaid at least 15 days and not more than 30 days prior to the date on which such special meeting shall convene to each of its members of record at his last address appearing on the books of the association. Such notice shall state the name of the association, the purpose or purposes for which the meeting is called, the place of the special meeting and the time when it shall convene. A similar notice shall be posted in a conspicuous place in each of the offices of the association during the 14 days immediately preceding the date on which such special meeting shall convene. If any member in person or by attorney thereunto authorized, shall waive in writing notice of any special meeting of members, notice thereof need not be given to such member.

4. *Meetings of the board of directors.* The board of directors shall meet regularly without notice at the home office of the association at least once each month at the hour and date fixed by resolution of the board of directors, provided that the place of meeting may be changed by the directors. Special meetings of the board of directors may be held at any place in the territory in which the association may make loans specified in a notice of such meeting and shall be called by the secretary upon the written request of the president, or of three directors. All special meetings shall be held upon at least 3 days' written notice to each director unless notice be waived in writing before or after such meeting. Such notice shall state the place, time, and purposes of such meeting. A majority of the directors shall constitute a quorum for the transaction of business. The act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the board of directors. All meetings of the board of directors shall be conducted in accordance with Roberts' Rules of Order.

5. *Officers, employees, and agents.* Annually at the meeting of the board of directors of the association next following the annual meeting of the members of the association, the board of directors shall elect a president, one or more vice presidents, a secretary, and a treasurer: *Provided*, That the offices of secretary and treasurer may be held by the same person, and a vice president may also be either the secretary or the treasurer. The board of directors may appoint such additional officers and such employees and agents as it may from time to time determine. The term of office of all officers shall be one year or until their respective successors are elected and qualified; but any officer may be removed at any time by the board of directors. In the absence of designation from time to time of powers and duties by the board of directors, the officers shall have such powers and duties as generally pertain to their respective offices.

6. *Resignation of directors.* Any director may resign at any time by sending a written notice of such resignation to the office of the association delivered to the secretary. Unless otherwise specified therein, such resignation shall take effect upon receipt thereof by the secretary. More than three consecutive absences from regular meetings of the board of directors, unless excused by resolution of the board of directors, shall automatically constitute a resignation, effective when such resignation is accepted by the board of directors.

7. *Powers of the board.* The board of directors shall have power—

(a) To appoint and remove by resolution the members of an executive committee, the members of which shall be directors, which committee shall have and exercise the powers of the board of directors between the meetings of the board of directors;

(b) To appoint and remove by resolution the members of such other committees as may be deemed necessary and prescribe the duties thereof;

(c) To fix the compensation of directors, officers, and employees; and to remove any officer or employee at any time with or without cause;

(d) To extend leniency and indulgence to borrowing members who are in distress and generally to compromise and settle any debts and claims;

(e) To limit payments on capital which may be accepted;

(f) To reject any application for savings accounts or membership; and

(g) To exercise any and all of the powers of the association not expressly reserved by the charter to the members.

8. *Execution of instruments, generally.* All documents and instruments or writings of any nature shall be signed, executed, verified, acknowledged, and delivered by such officers, agents, or employees of the association or any one of them and in such manner as from time to time may be determined by resolution of the board of directors. All notes, drafts, acceptances, checks, endorsements, and all evidences of indebtedness of the association whatsoever shall be signed by such officer or officers or such agent or agents of the association and in such manner as the board of directors may from time to time determine. Endorsements for deposit to the credit of the association in any of its duly authorized depositories shall be made in such manner as the board of directors may from time to time determine. Proxies to vote with respect to shares or accounts of other associations or stock of other corporations owned by or standing in the name of the association may be executed and delivered from time to time on behalf of the association by the president or a vice president and the secretary or an assistant secretary of the association or by any other person or persons thereunto authorized by the board of directors.

9. *Savings account certificates.* Such officers or employees as may be designated by the board of directors shall deliver to each person upon the initial payment on

his savings account in the association an account book or other written evidence of such account.

10. *Seal.* The seal shall be two concentric circles between which shall be the name of the association. The year of incorporation, the word "incorporated", or an emblem may appear in the center.

11. *Amendment.* These bylaws may be amended at any time by a two-thirds affirmative vote of the board of directors, or by a vote of the members of the association. Each and every amendment shall be subject to the approval of the Federal Home Loan Bank Board, and shall be ineffective until such approval shall be given: *Provided, That*, without the approval of the Federal Home Loan Bank Board, section 1 of the bylaws may be amended so that the time of day for convening the annual meeting may be fixed at any hour not earlier than 10 a.m. or later than 9 p.m., and a section providing for a bonus may be added or repealed as provided in the rules and regulations for the Federal Savings and Loan System.

APPENDIX C

Federal Home Loan Bank Board Ruling,
Escrow Business; power to engage in.
[12 CFR 555.2] (Adopted 11-24-59)

A Federal association has no power, express or implied, to act generally as an agent for the public in handling escrows. However, a Federal association may handle escrows related to real estate loans it makes and, to an extent reasonably incidental to the accomplishment of its express objects, may handle escrows for others involving the type of real estate transactions that are common to the savings and loan business. In the handling of any escrow, a Federal association may not assume duties or responsibilities or perform acts which are in conflict with the limitations on its power imposed by the Home Owners' Loan Act of 1933, as amended, and regulations thereunder or its charter.

APPENDIX D

Amendment of September 2, 1964, Section 5(c)
of the Home Owners' Loan Act of 1933,
12 U.S.C.A. § 1464(c)

§ 1464. Federal Savings and Loan Associations

* * *

Loans; security required; investment of assets

(c) * * * Any such association is authorized to invest in the capital stock, obligations, or other securities of any corporation organized under the laws of the State, District, Commonwealth, territory, or possession in which the home office of the association is located, if the entire capital stock of such corporation is available for purchase only by savings and loan associations of that State, District, Commonwealth, territory, or possession and by Federal savings and loan associations having their home offices therein, but no association may make any investment under this sentence if its aggregate outstanding investment under this sentence, determined as prescribed by the Board, would thereupon exceed 1 per centum of its assets.

APPENDIX E

Exhibit A to Statement of Points and Authorities in Opposition to Motion to Dismiss of Appellants to Second Amended and Supplemental Complaint of Beverly Hills Federal Savings & Loan Association, filed August 27, 1965-- Affidavit of Lawrence M. Walters, Director of the Office of Examinations and Supervision, Federal Home Loan Bank Board

DISTRICT OF COLUMBIA, SS:

I, LAWRENCE M. WALTERS, being first duly sworn, depose and say that I am the Director of the Office of Examinations and Supervision of the Federal Home Loan Bank Board, which position I have held since July 1, 1965. From November 1, 1960 through December 31, 1963, I was the Director of the Division of Examinations of the Federal Home Loan Bank Board and from January 1, 1964 through June 30, 1965, I served as Deputy Director of the Office of Examinations and Supervision of the Federal Home Loan Bank Board.

In connection with my duties in these several positions with the Federal Home Loan Bank Board and even prior to my becoming Director of the Division of Examinations in 1960, I was and have been acquainted with KENNETH F. SPENCER and his activities as an employee of this agency.

The records of the Office of Examinations and Supervision, which are kept in the normal course of business, which are under my custody and control, and which I have examined, reveal that KENNETH F. SPENCER was first employed by the Federal Home Loan Bank Board as an Examiner in the Boston District Office on September 21, 1953 and he served in various grades as an Examiner in the Boston District Office from September 21, 1953 to the date of his reassignment to the Division of Examinations of the Federal Home Loan Bank Board in Washington on January 11, 1963. He served as a Training and Development Officer and as a Savings and Loan Examining Officer from January 11, 1963 until his resignation on January 13, 1965.

The records of this office further reflect that while he was assigned duties in connection with the Beverly Hills Federal Savings and Loan Association litigation from early in 1963 to the date of his resignation he was never present at Beverly Hills Federal Savings and Loan Association at any time during this period from March 1961 through January 1965 nor did he participate as an Examiner in the four regular periodic or the one special examination of this Association which were conducted at Beverly Hills Federal Savings and Loan Association between April 14, 1961 and January, 1965.

KENNETH F. SPENCER was not present in the City of Los Angeles according to the records of this office, during the Special Examination of the Association, which commenced on April 17, 1961, nor was he present in Los Angeles during the regular periodic examinations which were commenced on November 20, 1961, November 26, 1962 and December 9, 1963, respectively. During the regular periodic examination which commenced on December 17, 1964 and which concluded on January 29, 1965, he was present in Los Angeles, while he was still an employee of this Board, for approximately seven days but I am able to state that he was not present in the Association as an Examiner of the Federal Home Loan Bank Board or in any other capacity as an employee of the agency during this seven-day period.

The records of this office further reveal that during the period from March 14, 1961 to January 29, 1965 the four regular periodic examinations were held for this Association as required by law and regulation for all Federal Associations. The one Special Examination previously referenced required Examiners being in the Association for only thirteen (13) workdays.

/s/ Lawrence M. Walters

[Notarial Certificate
dated October 22, 1965]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

LEWIS FOOD COMPANY, INC.,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant United States Attorney,
Chief, Criminal Division,
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Attorneys for Appellant,
United States of America.

FILED

FEB 17 1986

WILLIAM L. CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

LEWIS FOOD COMPANY, INC.,

Appellee.

APPELLANT'S OPENING BRIEF

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Attorneys for Appellant,
United States of America.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

VS.

LEWIS FOOD COMPANY, INC.,

Appellee.

APPELLANT'S OPENING BRIEF

I

JURISDICTIONAL STATEMENT

On July 17, 1963, the Federal Grand Jury for the Southern District of California, Central Division, returned an indictment, under Number 32456-CD, charging the defendant Lewis Food Company, Incorporated, with four violations of Title 18, United States Code, Section 610 [C. T. 2]. ^{1/} Pursuant to that statute, as well as Section 3231 of Title 18, the District Court acquired jurisdiction over the case.

On November 25, 1964, the Honorable C. Nils Tavares granted the defendant's motion to dismiss the indictment on the ground that it failed to state an offense under Section 610 of Title

^{1/} "C. T." refers to Clerk's Transcript of Record.

18. U.S.C. [C. T. 88, 236 F. Supp. 849 (D. C. Cal. 1964)]. On December 11, 1964, the Government filed a motion to vacate the order and to rehear the matter [C. T. 94], which motion was denied on December 21, 1964 [C. T. 150].

On January 20, 1965, a timely notice of appeal to the Supreme Court was filed [C. T. 153], in accordance with Rule 37a(2) of the Federal Rules of Criminal Procedure, Section 3731 of Title 18, U.S.C., and the doctrine of United States v. Healy, 376 U.S. 75 (1964).

On May 17, 1965, the Supreme Court granted a motion to transfer the case to this court, and the case was remanded pursuant to 18 U.S.C. Section 3731. United States v. Lewis Food Co. Inc., 381 U.S. 908 (1965). Based on the foregoing, and Title 28 U.S.C. Sections 1291 and 1294, this Court has jurisdiction to review the order of the court below.

II

STATEMENT OF THE CASE

Count One of the Indictment charges as follows:

"1. That at all times mentioned herein the defendant, LEWIS FOOD COMPANY, INCORPORATED, was a California Corporation, duly authorized and licensed under the laws of the State of California and doing business in said state;

"2. That on June 5, 1962, a primary

election was held in the State of California, in which candidates for the office of United States Senator and candidates for the office of member of the United States House of Representatives were to be selected;

"3. That on or about July 11, 1962, within the Central Division of the Southern District of California, defendant LEWIS FOOD COMPANY, INCORPORATED, did unlawfully make an expenditure in connection with the aforesaid primary election in that the defendant at the time and place aforesaid, pursuant to an agreement made before said election, did make payment to the Rockett Lauritsen Advertising Agency for the placement of an advertisement concerning candidates therein; that said advertisement was entitled "Important Notice to Voters, " and, appeared in the following newspapers on the dates and for the amounts indicated, to wit: . . ."

Thereafter, the charge lists twelve California newspapers in which the advertisement was placed on June 4, 1962, the day before the primaries, and the cost of each publication. The amounts expended totaled \$5,509.62. The remaining three counts duplicate the allegations of Count One but respectively cover expenditures by the defendant to the advertising firm on July 17, 1962, for advertisements published on June 4, 1962, in eight California newspapers, totaling \$2,042.04; on July 24, 1962, for advertisements published on June 4, 1962, in fourteen California newspapers, totaling

\$1,786.38; and on August 15, 1962, for advertisements published on June 4, 1962, in one California newspaper. All of the expenditures totaled \$9,523.68.

A copy of the "Important Notice to Voters" was furnished in a Bill of Particulars filed on September 26, 1963 [C. T. 44].

The defendant's motion to dismiss the indictment was initially made on September 9, 1963, before the Honorable Albert Lee Stephens, Jr., United States District Judge, to whom the case was first assigned for trial [C. T. 9, et seq.]. The defendant contended that the pertinent statute was unconstitutional and that the indictment failed to state an offense. Following written opposition by the Government [C. T. 47 et seq.], Judge Stephens denied the motion by Order filed on October 3, 1963 [C. T. 106].

The inability of the jury to reach a verdict resulted in the declaration of a mistrial by Judge Stephens on October 23, 1963 [C. T. 100]. The case was thereafter, on June 26, 1964, assigned to Judge Tavares for retrial (See Docket entries following Index to Clerk's Transcript of Proceedings).

On November 25, 1964, Judge Tavares entered an Order dismissing the indictment on the grounds that it failed to state an offense under Section 610 [C. T. 88; 236 F.Supp. 849, supra]. It is this Order which the Government now challenges on appeal.

III

SPECIFICATION OF ERROR

The Court below erred in dismissing the indictment on the ground that it failed to state an offense under 18 U. S. C. Section 610.

IV

PERTINENT STATUTE

Title 18, United States Code, Section 610:

"Contributions or expenditures by
national banks, corporations or
labor organizations

"It is unlawful for any national bank, or any corporation, organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senate or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political

convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

"Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

"For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purposes, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or condition of work."



elections for federal offices. ^{2/} In two landmark cases, United States v. C. I. O., 335 U.S. 106 (1948), and United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers, 352 U.S. 567 (1957) [hereinafter cited as Auto Workers], the statute has come before the Supreme Court for interpretation of the word "expenditure." As the C. I. O. Court noted at 112,

" 'Expenditure' as here used is not a word of art. It has no definitely defined meaning and the applicability of the word to prohibition of particular acts must be determined from the circumstances surrounding its employment.

"The purpose of Congress is a dominant factor in determining meaning. There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments. Nor, where doubt exists, should we disregard informed congressional discussion. "

In each decision, the Supreme Court analyzed the legislative history of the statute, and proceeded to implement Congressional purpose.

^{2/} The pertinent parts of the statute are based on Public Law No. 36, Act of January 26, 1907 (Sen. Bill 4563), 34 Stat. 864 (limited to contributions by corporations); and Public Law 101, Amendment to Corrupt Practices Act, June 23, 1947 (House Bill 3020), 61 Stat. 136, 159 (added labor unions and word "expenditure").

In the C. I. O. case, supra, the labor organization and its president were indicted for violating Section 610 by reason of having distributed to union members or purchasers an issue of "The C. I. O. News," a weekly newspaper published by the union, which issue contained a statement from the president urging all members to vote for a certain candidate. The District Court dismissed the indictment on constitutional grounds. On review, the Supreme Court affirmed, holding that the indictment failed to state an offense. The Court felt that Congress did not intend to bar by Section 610 a trade journal, house organ, or newspaper regularly published by a labor union or corporation, from expressing its views on candidates to its members or shareholders.

In the Auto Workers case, supra, the Court upheld the sufficiency of an indictment which charged a labor organization with using union dues to sponsor a commercial television broadcast which urged and endorsed the selection of certain candidates, and included expressions of political advocacy intended to influence the electorate. The Court, distinguishing the C. I. O. case, construed the statute to prohibit "the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." United States v. Auto Workers, at 567 [Emphasis Added]. This then is the standard which must be employed in evaluating the "Important Notice to Voters" advertisement now before this Court on this appeal.

An examination of the subject advertisement clearly demonstrates that it meets the Supreme Court's criterion. The

publication occurred the day before the primary election. Its coverage was statewide in scope. The publication was directed to "Voters" in particular, rather than the general reading public. Its official-looking character and pretensions to state only the candidates' "voting records," in the interests of "public service," would lead many people to favor the high-ranked candidates and to vote against the lower ones.

That this advertisement attempts to influence the public how to vote is further evidenced by the command: "Vote for the candidates whose voting record indicates that they believe in those principles" (i. e. of "our free enterprise system, our constitutional government and freedom under God.") [Emphasis Added]. The advertisement further states:

"If you as voters do not like their voting record, then you have a right and privilege to vote a new candidate in their place . . .

* * *

"The index is an invaluable guide for the voter who wants to cast his ballot with intelligence and discrimination, in other words, for the voter who wants to know more about the candidate than just their party labels."

The listing rates the candidates as to how they voted, not on any specific issues, not on specific bills, but on what is loosely labeled "constitutional principles." What term could be more

encompassing? More appealing to every voter? Who could turn down a man who voted "100%" in accordance with the constitution? In the very words of the advertisement, "100% is perfect." By contrast consider the opprobrium attached to a candidate who never once upheld that sacred document. There can be no doubt that this advertisement was but a patent attempt to laude certain incumbents while disfavoring others, and so influence the voting public to vote for the preferred candidate.

Note further that the listing rates candidates according to party affiliation. Of the thirty members of the House of Representatives, the sixteen Democrats are all rated "5%" or "0%", ten being in the "0%" category. Of the fourteen Republicans, two are listed at "18%" and "30%", with the remaining twelve averaging above "75%", all being at least "59%" or greater. With a few exceptions, this same disparity between the two parties is carried over into the rating of the candidates for other offices as well. Again, we see plain evidence of an attempt to do exactly what the statute prohibits: advocate the position of one political party over another.

The advertisement purports to be only a statement of voting records. But examining it with a "common sense appreciation of the realities." McKinney v. United States, 172 F.2d 781 (9th Cir. 1949), we must conclude otherwise. The basis of the index is not specified. No particular issue or bill is identified. Rather the advertisement is a clear-cut attempt to pass off as a voting record, a biased, one-sided, incomplete analysis calculated to

sway and influence virtually all of the voters in the State of California to vote in the manner in which they were persuaded by the makers of the popular "Dr. Ross Pet Food line," to wit, the defendant.

But at minimum, whether the expenditure constitutes "active electioneering" or is "in the same category as the records of candidates on economic issues" [C. T. 91], is a question of fact for the jury to resolve under proper instructions. Certainly, this is what the Supreme Court had in mind in the dicta alluded to by the court below and what Congress intended in enacting Section 610.

In the Auto Workers case, supra, at 592, the Court stated:

"Allegations of the indictment hypothetically framed to elicit a ruling from this Court or based upon misunderstanding of the facts may not survive the test of proof. For example, was the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis? Did the broadcast reach the public at large or only those affiliated with appellee? Did it constitute active electioneering or simply state the record of particular candidates on economic issues? Did the union sponsor the broadcast with the intent to affect the results of the election? As Senator Taft repeatedly recognized in the debate on § 304, prosecutions under

the Act may present difficult questions of fact. See supra, pp. 585-587, n. 1. We suggest the possibility of such questions, not to imply answers to problems of statutory construction, but merely to indicate the covert issues that may be involved in this case."

[Emphasis Added].

Underlying the Supreme Court's reference to "voting records" is the following discussion on the Senate floor:

"MR. BALL. I do not think there is a single thing in the bill which prohibits any union or corporation or anyone else from printing any public official's voting record. That is not a campaign for or against a candidate. It is simply the printing of public information.

"MR. TAFT. I was thinking of the way most of the labor organizations are on record. They do not, as a rule, merely print facts.

* * *

"MR. PEPPER. I wish to ask the Senator from Ohio whether he agrees with the Senator from Minnesota [Mr. Ball], who just expressed the opinion that if a labor organization used its funds to disseminate the voting record of a candidate for office, during the time of the campaign, that would not be unlawful. Does the Senator from Ohio agree with

the Senator from Minnesota that that would not be unlawful, because it would not be an expenditure in connection with an election in which certain candidates or political parties are involved?

"MR. TAFT. I think it would depend upon all the circumstances in the case. If it was merely a bare statement of actual facts and simply direct quotations of what the man had said in the course of certain speeches on certain subjects, and was not colored in any way, I would rather agree with the Senator from Minnesota. But I think it would depend, in each case, on the character of the publication.

"MR. PEPPER. Of course, the language is 'in connection with.' The provision does not contain any statement as to whether the statement is colored or not. The words simply are 'any expenditure in connection with an election.' I do not see how the Senator could say that the publication of a voting record, in the midst of a campaign, was not an expenditure in the midst of an election.

"MR. TAFT. That is not a very practical question, because no one would do just that. Either it is an argument for him or against him, or it is not. * * *" [Emphasis Added].

93 Cong. Rec. 6446-47, June 5, 1947.

Both Congress and the Supreme Court recognized that the mere label, "Voting Record," does not free the publication from the statutes' proscription. Rather, it is a question for the fact-finder whether the publication is colored or not. In the case at hand, considering the nature of the expenditures in question, it was most certainly error for the lower court to foreclose forever the issue of fact and rule as a matter of law that the expenditure was a lawful one.

The case of United States v. Pennell, 144 F. Supp. 317 (N.D. Cal. 1956), is not unlike the situation at hand. There, the indictment charged the interstate communication of a threat to injure a Mrs. Gloria Pennell in violation of 18 U.S.C. Section 875(c). By bill of particulars, the Government furnished a copy of the letter. In pertinent part it stated:

" . . . I shall in the very near future be in Sacramento to deal with you and your cohorts. I dislike very much having to deal with you and your men in this manner - but there seems to be no other way * * * Believe me, Baby, this is serious now. . . ."

The defendant moved to dismiss, arguing that the words, "to deal with" do not constitute a threat. In denying the motion the Court said at 319:

" . . . It cannot be said as a matter of law that there is no threat to injure the person of Mrs. Gloria Pennell. Whether these words constitute a threat . . . is a question of fact for the trier of

the facts, and not a question to be determined by this Court at this time on a motion to dismiss."

It should also be noted that Congress added the word "expenditure" as a remedial measure, to "plug the existing loop-hole" in the law, see United States v. Auto Workers, supra, at 581-82, because of the numerous indirect contributions and expenses on candidates' behalf revealed by committee investigations. To now hold, as did the lower court, that the "Important Notice to Voters" lies outside the statutes' purview, defeats congressional purpose in amending the statute and permits easy evasion of the law.

B. THE CHARGE OF THE INDICTMENT THAT THE DEFENDANT CORPORATION "DID UNLAWFULLY MAKE AN EXPENDITURE" IN CONNECTION WITH A PRIMARY ELECTION SUFFICIENTLY STATES AN OFFENSE, WITHOUT FURTHER ALLEGING THAT GENERAL CORPORATE FUNDS WERE USED, AND THAT THE EXPENDITURE WAS CONTRARY TO THE SHAREHOLDERS' WISHES.

Besides holding the advertisement to be a voting record and consequently beyond the scope of Section 610, the lower court also ruled that the indictment was fatally defective because it failed to allege that the expenditure came from "general funds" of the corporation and that the funds were used without the consent of the shareholders. Again the lower court was in error.

The instant indictment incorporates the wording of the statute by alleging that the defendant "corporation" did unlawfully "make" an "expenditure in connection with" an election. Thus the charging instrument meets the well-established view that indictments pleaded in the language of the statute are sufficient against a motion to dismiss. See Robison v. United States, 329 F. 2d 156 (9th Cir. 1964), cert. denied, 379 U. S. 859; Rood v. United States, 340 F. 2d 506 (8th Cir. 1965); United States v. Spada, 331 F. 2d 995 (2nd Cir. 1964); Worthy v. United States, 328 F. 2d 386 (5th Cir. 1964); Forms 1 - 11, Appendix, Federal Rules of Criminal Procedure.

Furthermore, it is quite obvious that "general funds" of the corporation are intended to be covered by the indictment. How

else could the expenditure be that of the corporation? If the funds were provided independently by some or all of the shareholders, it is not the corporation making the expenditure, but the shareholders as individuals.

Admittedly, whether the corporation's general funds were employed or not is a crucial consideration. But this is a question of fact, to be resolved like all other such questions rather than on a motion to dismiss. When the Supreme Court asked in the Auto Workers case, supra, at 592, "[W]as the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis?", the Court was referring to "the test of proof," and "questions of fact."

Thus, if the Government were unable to prove that corporation funds were used, the trier of fact would be justified in granting an acquittal, just as it would if the Government failed to prove that the defendant was a corporation, or that a primary election was held, or that the advertisement was actually published. But all these are fact issues, and the lower court erred in deciding one of them as a matter of law.

We submit further that whether or not the shareholders consented to the defendant's expenditure is completely immaterial. "Any corporation whatever" is covered by Section 610, not merely a corporation acting without its owners' authority. To now add such an element to the offense violates cardinal rules of statutory construction:

"The judicial function to be exercised in construing a statute is limited to ascertaining the



intention of the legislature therein expressed. *Ebert v. Poston*, 266 U. S. 548, 45 S. Ct. 188, 69 L. Ed. 435. Congressional intent is sought primarily in the language of the statute, and where this language expresses an intention reasonably intelligible and plain, it must be accepted without modification by resort to construction or conjecture. *Thompson v. United States*, 246 U. S. 547, 38 S. Ct. 349, 62 L. Ed. 876, and *Gorin v. United States*, 9 Cir., 111 F. 2d 712. There is no need for resort to the rules of interpretation or construction when the language of the statute is plain and free from ambiguity. *Osaka Shosen Kaisha Line v. United States*, 300 U. S. 98, 57 S. Ct. 356, 81 L. Ed. 532; *Adams Express Co. v. Commonwealth of Kentucky*, 238 U. S. 190, 35 S. Ct. 824, 59 L. Ed. 1267; *Athens Stove Works v. Fleming*, *supra*, and *Braffith v. People of Virgin Islands*, *supra*

Courts are not at liberty to amend or repeal a statute under a guise of construction, *Osaka Shosen Kaisha Line v. United States*, *supra*, and *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 56 S. Ct. 70, 80 L. Ed. 62, nor is it within the judicial function of a court to supply omissions in a statute, even though that which was omitted may have been omitted by oversight or inadvertence. *Wallace v.*

Cutten, 298 U.S. 229, 56 S.Ct. 753, 80 L.Ed. 1157; Iselin v. United States, 270 U.S. 245, 46 S.Ct. 248, 70 L.Ed. 566; and Ebert v. Poston, supra. It is not for a court to extend the scope of a statute beyond the point where Congress indicated it would stop. 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 71 S.Ct. 515, 95 L.Ed. 566." (Emphasis added).

In re Shear, 139 F.Supp. 217, 220-21 N.D. Cal.
1956.

Section 610 is based upon Public Law No. 36, of January 26, 1907, 34 Stat. 864. That law like the present one prohibited contributions by "any corporation whatever." The legislative history of the early enactment provides further evidence of a congressional intent to cover all corporations. President Roosevelt in his annual message to Congress stated:

"I again recommend a law prohibiting all corporations from contributing to the campaign expenses of any party. Such a bill has already passed one House of Congress. Let individuals contribute as they desire; but let us prohibit in effective fashion all corporations from making contributions for any political purpose directly or indirectly."

41 Cong. Rec. 22

On the floor of Congress the measure was explained thusly:

"Mr. Gaines: . . . 'The second provision of the bill makes it unlawful for any corporation whatever . . . unlawful for any corporation of any character to make a money contribution '

* * *

Mr. Rucker: . . . 'The second clause prohibits corporations of any character from making money contributions ' " (Emphasis added)

41 Cong. Rec. 1452.

Note further that by this act Congress sought to curb the powerful and often corrupting influence of corporations over elections. See United States v. Auto Workers at 570-571. In view of this purpose, there would be no reason at all to exempt some corporations simply because the shareholders consented to the contributions. Thus, it is apparent that the District Court's ruling annuls both the expectations and purpose of Congress as well as its statutory mandate.

The Auto Workers case provides even further authority for rejecting the element of consent suggested by the court below. The indictment there contained no allegation that the expenditure of union funds was contrary to the members' authority. Nevertheless, the indictment was found sufficient by the high court. See pp. 584-85.

In the only decisions touching on the matter of consent, United States v. Painters Local Union, 172 F.2d 854 (2nd Cir. 1949), and United States v. Anchorage Central Labor Council, 193 F.Supp. 504 (D. Alaska 1961), the matter was raised in the

courts' summary of the facts, rather than having been part of the indictment. And in each case, the ultimate decision of the court was based on other grounds.

In the Painters Local case, supra, a labor union was charged with making unlawful campaign expenditures totalling \$143.64. In summarizing the facts the court noted that the expenditure was authorized at a membership meeting. But the decision dismissing the indictment rested in large part upon the court's view of the expenditure as "trifling" and the fact that the press and radio were normal means of communicating the union's views to its members.

In the Anchorage case, supra, the defendant was an association of some twenty-six labor unions. The court observed that the expenditures in question came from a "TV" fund made up by contributions from the several unions. Each union decided by vote of its membership whether they would contribute. The court, in granting a judgment of acquittal, held that the expenditure was not paid for by general association funds but rather from funds obtained on a "voluntary basis". The court also based its ruling on the fact that the media used in the broadcast was regularly used by the union in communicating to its members.

It is clear then that neither of these cases lend much support to the proposition advanced below, that "general funds of the stockholders so used with the consent of the stockholders . . . do not come within the purview of the statute." Indeed, as already indicated, such view is contrary to the express language of the statute, the intent of Congress, and the ruling of the Supreme Court in the Auto Workers case.



CONCLUSION

Based on the foregoing, we submit that the lower court erred in dismissing the indictment and its decision should be reversed.

Respectfully submitted,

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United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Burt Pines

BURT PINES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMPANIA NAVIERA DE BAJA CALIFORNIA,

. A.,

Appellant - Defendant and
Third Party Plaintiff,

vs.

ERNARD A. NORIEGA,

Appellee - Plaintiff,

vs.

RESCENT WHARF & WAREHOUSE COMPANY,

corporation,

Appellant - Third Party Defendant.

FRAN

REPLY BRIEF OF APPELLANT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A.

OVERTON, LYMAN & PRINCE

Attorneys for COMPANIA NAVIERA
DE BAJA CALIFORNIA, S. A.

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COUNTER-STATEMENT OF THE CASE

Appellee COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A., hereinafter referred to as "COMPANIA", has set forth the background facts in some detail in subparagraph b entitled "The Material Facts" of its Statement of the Case on pages 2-4 of its opening brief in the appeal in the case between COMPANIA and BERNARD A. NORIEGA, hereinafter referred to as "NORIEGA".

CRESCENT WHARF & WAREHOUSE COMPANY, hereinafter referred to as "CRESCENT", undertook to load brick into one of the holds of the "SAN LUCIANO" during a call to Los Angeles in April 1963. CRESCENT held itself out as a professional, experienced and carefull stevedoring company. CRESCENT was not only a professional stevedoring company, but more importantly had handled the "SAN LUCIANO" on dozens of previous occasions. It determined what equipment and supplies would be used. It determined what men and how many should be used and the amount of supervision they should have. It determined in what manner the ship would be loaded and how its gear should be rigged. I so rigged the gear that the blacksmith or sling, as it is sometimes called, came in contact with a strongback socket creating a hazard. As a consequence the socket was bent and had to be repaired. Work was stopped for a brief interval whi repairs were effected. Notwithstanding this experience and knowledge supposedly gained from it, CRESCENT resumed work

After repairs were effected without making a single change in its method of operation or equipment used. As a result of continued contact with the socket, it was ultimately dislodged and a piece struck the head of NORIEGA, who was working below as an employee of CRESCENT.

COMPANIA denies the following assertions of CRESCENT in its opening brief in the appeal of the action against it for indemnity.

FACTS MISSTATED BY CRESCENT

(1) It is not true that as loads descended into the hatch that "the gear had to come in contact with a flange" (CRESCENT'S Brief Page 3);

(2) It is not true that:

"it was necessary and unavoidable that the yard fall would rub against the edges of the coaming" (CRESCENT'S Brief Page 3);

(3) It is not true that:

"the only manner in which the load could have been brought in without capsizing and hitting the shaft alley was the method being used by the longshoremen" (CRESCENT'S Brief Page 3);

As the court below stated:

"The court is satisfied that there were undoubtedly other methods of loading which could have been employed with the flange in place, although they may have been



The court's statement is substantiated by the fact CRESCENT had safely worked this ship and the same hold on dozens of prior occasions.

BY MR. LARSON:

Q Would you state your full name and occupation, Mr. Hansen?

A Norman Knute Hansen, ship boss and hatch boss for Crescent Wharf Company.

Q How long have you held that position with that Company?

A Ten years, sir.

Q Were you so employed as hatch boss on April 18, 1963, in connection with the loading of the SAN LUCIANO?

A I was, sir.

Q Had you worked that ship before this occasion?

A Dozens of times.

Q Had you worked in the particular hold before?

A I had. (Tr. Page 47, Line 20 through Page 48, Line 7) [Emphasis added]

Q Did you go on board that ship at about eight o'clock on April 18th?

A That's correct, sir.

Q What did you do when you first went on board?

A Well, we rigged the ship gear. On this occasion

we rigged the ship gear for number three hatch starboard tank inshore side, and I had worked the hatch several times before, so I knew just about the exact spot where the ship booms should be rigged. (Tr. Page 48, Lines 11-19) [Emphasis added]

- (4) CRESCENT'S statement "there was nothing on the gear which caught the flange at the time of the accident" is inconsistent with the remaining portion of the same sentence which states:

"the only contact was the usual one of dragging and rubbing the blacksmith and the wires across the coaming" (CRESCENT'S Brief Page 4)

FACTS OMITTED BY CRESCENT

CRESCENT'S statement of the case omits the

following:

- (1) After the socket was fixed CRESCENT was on notice that the socket would bend out by the scrapping and the dragging of its gear over it;
- (2) After the original damage was repaired, CRESCENT continued to load as it had before the temporary halt in operations. CRESCENT repeated the same process that originally bent the socket out;



- (3) After the socket was fixed there was no change in the rigging or procedures used by CRESCENT;
- (4) There was no attempt by CRESCENT to avoid the danger of bending or breaking the socket by preventing the gear from dragging and rubbing across it; and
- (5) The accident was caused not by faulty repair by COMPANIA but by CRESCENT'S subsequent negligent dragging of the gear over the socket.

ARGUMENT

- I. The findings that CRESCENT was negligent and breached its warranty of workmanlike service are amply supported by the evidence. Said findings are not "clearly erroneous" and may not be set aside;
- II. COMPANIA did not breach its implied-in-fact obligations owed to CRESCENT and is not guilty of conduct sufficient to preclude recovery in indemnity.
- III. Even assuming COMPANIA breached its implied-in-fact obligations owed to CRESCENT, CRESCENT waived the breach within the meaning of the rule of Hugev v. Dampski, 170 F. Supp. 601 (S.D. Cal. 1959); affrmd. 274 F. 2d 875 (9th Cir. 1960);
- IV. Indemnity is precluded only if the shipowner unreasonably

or materially hinders, delays or actively interferes with the performance of the stevedoring operations.

I

THE FINDINGS THAT CRESCENT WAS NEGLIGENT AND BREACHED ITS WARRANTY OF WORKMANLIKE SERVICE ARE AMPLY SUPPORTED BY THE EVIDENCE. SAID FINDINGS ARE NOT "CLEARLY ERRONEOUS" AND MAY NOT BE SET ASIDE.

The rules applicable to appeals in admiralty were recently stated in Knox v. United States Lines, Co., 320 F. 2d 247 (3rd Cir. 1963) at 249:

"The sole issue for our decision is whether the Trial Court's finding of fact were 'clearly erroneous' under the rule of McAllister v. United States . . . 'Under this rule an appellate court cannot upset a trial court's factual findings unless it "is left with the definite and firm conviction that a mistake has been committed".'"

See also:

Griffith v. Gardner, 196 F. 2d 698 (9th Cir. 1952);
Rogers v. Pacific Atlantic S.S. Co., 170 F. 2d 30
(9th Cir. 1948).

Furthermore, a finding as to negligence,¹

¹CRESCENT attacks as error Finding of Fact No. 5 that states it negligently allowed the gear to strike a metal flange on the vessel.



and a stevedoring company's breach of warranty of workmanlike service,² Crumady v. Joachim Hendrik Fisser, 358 U.S. 423, 3 L.Ed. 2d 413 (1959) are "findings of fact" within the "clearly erroneous" rule. The only question here, therefore, in affirming the judgment of indemnity is whether there is support in the record for the findings under attack which state CRESCENT was negligent and breached its implied obligations to perform its stevedoring services in a workmanlike manner. COMPANIA submits that CRESCENT'S allowing the loading gear to drag and scrape a socket, which had already been once bent out by the same process, is ample support for the findings of negligence and breach of the warranty of workmanlike performance of the stevedoring operations by CRESCENT. By the simple expedient of either raising or lowering the booms the blacksmith or bridle would have landed either forward or aft of the socket. CRESCENT chose to rely on chance.

II

COMPANIA DID NOT BREACH ITS IMPLIED-IN-FACT OBLIGATIONS OWED TO CRESCENT AND IS NOT GUILTY OF CONDUCT SUFFICIENT TO PRECLUDE RECOVERY IN INDEMNITY.

² CRESCENT attacks as error Finding of Fact No. 11 that states it breached its warranty of workmanlike services.

reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care under the circumstances to load or discharge the cargo, as the case may be, in a workmanlike manner and with reasonable safety to persons and property"; and

(2) "to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract"; and

(3) ". . . not unreasonably or materially to hinder, delay or interfere with performance of the stevedoring operations."

Obligation one was obviously met. The only part of



worked this hold on numerous occasions that there was no safe method of loading at 11:20 A.M. on April 18, 1963.

Obligation two is not applicable to this case since the socket was not a "latent or hidden danger". CRESCENT could hardly have been better advised of the existence and precise location of the socket.

Obligation three was also obviously met. The ship did not "hinder, delay or interfere with performance of the stevedoring operations". The Hugev case itself, where the mate authorized continued stevedoring operations in the face of a misplaced queen beam, was a stronger case for hindrance than our case where the ship's crew fixed the bent socket to the stevedoring company's satisfaction to the extent it "looked perfect". And in Hugev the court found no hindrance. There certainly was none here. The evidence would indicate that CRESCENT completely dominated the entire operation.

As pointed out in Italia Societa Per Zioni Di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 323; 11 L.Ed. 2d 732, 740 (1964):

"The shipowner defers to the qualification of the stevedoring contractor in the selection and use of equipment and relies on the competency of the Stevedoring Company."

III

EVEN ASSUMING COMPANIA BREACHED ITS IMPLIED-IN-FACT



OBLIGATIONS OWED TO CRESCENT, CRESCENT WAIVED THE BREACH
WITHIN THE MEANING OF THE RULE OF HUGEY v. DAMPSKI, 170 F.
Supp. 601 (S.D.Cal. 1959); affrmd. 274 F. 2d 875 (9th Cir.
1960).

Hugey, it should be noted, granted indemnity where
the stevedoring contractor had called to the shipowner's
attention a misplaced queen beam which caused the hatch boards
to wobble. The ship's foreman ordered the stevedoring work
halted, complained of the condition to the ship's mate; the
mate made an inspection and authorized the contractor's foreman
to proceed and the stevedoring contractor was engaged in
remedying the unseaworthy condition when one of the longshore-
men was injured. On these facts the court found at 611:

"The evidence is not such as to warrant a
finding that the shipowner here breached either
of these implied-in-fact obligations of the
stevedoring contract in any respect.

"Furthermore, if it were assumed arguendo
that the misplaced 'queen beam' was a breach by
the shipowner, the stevedoring contractor was
fully aware of this latent condition prior to
plaintiff's injury and nonetheless willingly
proceeded with the work despite the known
dangerous condition, and hence would be held
to have waived the breach."



court that the shipowner had not breached any duties it owed the stevedoring company. Having concluded thus, the Ninth Circuit stated "we need not consider" [the stevedoring company's contention] "that it did not waive the shipowner's breach". Respecting the asserted waiver, however, the Ninth Circuit stated at 876-877:

"We point out, however, that this factual issue [referring to whether there was a waiver] depends upon the court's conclusion as to whether the stevedoring company continued to unload as it had before the temporary halt in operation. There was no change in procedures used, and no attempt to avoid the danger by the use of another method. The evidence fully supports the finding of waiver, were it necessary." [Emphasis added]

COMPANIA submits CRESCENT did precisely what this court in Hugev stated would amount to a waiver of the shipowner's breach.

- (1) It continued to load as it had before the temporary halt in operation.
- (2) There was no change in procedures used.
- (3) There was no attempt to avoid the danger by the use of another method.

(4) The booms remained in the only spot which would allow the blacksmith or bridle to strike the very evident socket.

Hence, even if COMPANIA is guilty of a breach of its implied-in-fact obligations to the stevedoring company which would be sufficient to preclude indemnity, the stevedoring company waived the breach.

IV

INDEMNITY IS PRECLUDED ONLY IF THE SHIPOWNER UNREASONABLY OR MATERIALLY HINDERS, DELAYS OR ACTIVELY INTERFERES WITH THE PERFORMANCE OF THE STEVEDORING OPERATIONS.

COMPANIA urges the court to follow the rule recently formulated by the Second Circuit in Albanese v. N. V. Nederl. Amerik Stoomv. Maats, 346 F. 2d 481 (2nd Cir. 1965) and Mortensen v. A/S Glittre, 348 F. 2d 383 (2nd Cir. 1965).

"Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job—merely concurrent fault is not enough." Albanese, supra, at 484.

". . . 'active hindrance' of the contractor in the performance of its contractual duties . . . is required to defeat the indemnification



CONCLUSION

It seems perfectly evident that the injuries of NORIEGA were due entirely to the operations conducted by CRESCENT. Had CRESCENT not rigged the gear in the manner in which it did, the accident could not have happened. Had CRESCENT either lowered or raised either of the two booms, the point of landing of the respective pallets would have obviously been forward or aft of the position of the strongback socket. This CRESCENT chose not to do, but instead wrecklessly pursued a plan which its own prior experience had shown would lead to difficulty. CRESCENT knew of the location of the socket; it knew that as rigged, its blacksmith or sling had and would continue to come in contact with it; it knew that it had men working below, including NORIEGA. It would have this court hold that notwithstanding the foregoing it proceeded in a careful and workmanlike manner. It would now have this court exonerate it from the consequences of not just an ordinary negligent act, but from the consequences of assuming a known risk, all in breach of its obligation to perform its stevedoring services in a workmanlike manner.

Dated: November 30, 1965.

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BY 
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Dan Brennan



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A. ,

Appellant - Defendant and Third Party Plaintiff,

vs.

BERNARD A. NORIEGA,

Appellee - Plaintiff,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation,

Appellant - Third Party Defendant.

BRIEF OF APPELLEE
BERNARD A. NORIEGA

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation,

Appellant - Third Party Defendant.

BRIEF OF APPELLEE
BERNARD A. NORIEGA

Statement Of The Case

Appellee BERNARD A. NORIEGA (plaintiff below) was a longshoreman working aboard Appellant's (COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A.) vessel the SS "SAN LUCIANO" on April 18, 1963 and suffered personal injuries when a portion of a steel flange fell upon his head from a coaming above him.

On the day of the accident Appellee was a member of an eight-man crew working in the No. 3 starboard hatch in the

inshore deep tank. The deep tank was the lowest deck or hold space of the vessel, being at the ship's bottom, below the tween decks. The tween decks hatch opening to the inshore deep tank was only 12 feet long by 8 feet wide and the width was reduced as to effective working area by a 3 foot shaft alley which any load must clear. Hence the clear hatch area at the time of the accident was only about 5 feet by 12 feet. (Tr. pp. 48-50; 22-23.)

On the day of the accident, April 18, 1963, the men in the deep tank were loading said hold area with bricks being brought in by pallet boards. The pallet boards were 3 feet by 6 feet. To lower the pallet boards through the tween decks hatch into the deep tank in such manner as to avoid the shaft alley required the winch driver to drag at the critical point on one line of the rigging (the yard fall). This pulled the load inshore, avoiding the shaft alley. Otherwise the load would land on top of the shaft alley and not descend into the deep tank.^{1/}

^{1/} "A. There was a shaft protruding and a shelf around, even with the coaming in the lower hold, and the winch driver would come down as far -- pretty close to the shaft alley and then swing on the yard line and miss the shaft alley.

"Q. So that in order for the pallet to set down on the little four wheeler which was down in there ---

"A. Yes.

"Q. -- a strain would be taken on the yard line to swing it over under the coaming?

"A. Not under the coaming.

"Q. All right. Where would it swing?

(Continued)

The consequence of thus pulling over the load by the yard fall to escape the shaft alley was to cause the rigging to drag and strike against the coaming of the tween decks hatch. Fastened to the side of the coaming at this point were two flanges which formerly had been used to support a strongback. When the rigging was pulled to avoid the shaft alley the rigging and gear (including particularly the blacksmith and the eyes of the wire slings to the pallet board) would drag over and strike against the flanges on the coaming. 2/

1/ (Con'd): "A. It would swing just a little bit to miss the shaft alley."

---Testimony of Appellee, Tr. p. 24.

"A. Well, you cannot bring the load to the lower hold at no time on the midship, because you have a three foot shaft alley in the lower hold standing at -- the height of it is about six feet, and after you leave this shelf deck going down you definitely have to slack it over to the yard fall.

"Q. That is because of --

"A. In order to get the load into the lower hold. Otherwise you'll be landing on the shaft alley."

---Witness Hansen, Tr. p. 68.

2/ "A. As we come in the hold we naturally come in on practically two falls until we get down to the shaft alley, get down into the tween deck, and then we slack it over onto the yard fall only in order to clear the shaft alley, so that it was the yard fall that was hanging all the time.

"Q. So that as you slacked over to the yard fall, that caused the pallet load to swing in the direction of the coaming where the flanges were?

"A. That is the only way you can bring the load in without capsizing the load and hitting the shaft alley
(Continued)

The flanges were fastened against the side of the coaming and protruded into the hatch area by their own width or thickness. As counsel for Appellant stated to the trial court, speaking of the findings as to the flange which ultimately fell,

" . . . it was flush against the coaming but extending into the working area approximately three-sixteenths of an inch. " (Tr. p. 101.)

Moreover, the bottom portion of the flanges protruded even further because attached to bolts which protruded an additional "half to three-quarters of an inch. " (Tr. p. 60.)

So severely did the rigging gear and wires holding the

2/ (Cont'd): which comes out three feet. "

---Witness Hansen, Tr. pp.57-58.

"A. Well, if this thing would go straight down it would hit the shaft alley, you see, so when he come down that far he would take a strain on the yard fall.

"Q. (By Mr. Larson) And that would just swing it over?

"A. That's right.

"Q. And when the strain was taken on the yard fall, would it rub against the edges of the coaming on the tween decks hatch?

"A. Yes.

"Q. Had you noticed before the time that this flange hit you, had you noticed there had been at least three instances in which the yard fall had hung up on this flange?

"A. Yes. "

---Testimony of Appellee, Tr. p. 27.

descending pallet loads drag over and strike against the flange concerned in the accident that the upper lip thereof began to open up and pull away from the coaming, and the yard fall on three occasions "hung up on this flange", stopping the loads in mid-air and causing some bricks to fall. (Tr. p. 27.)

After the third load had "hung up" in this manner, the hatch boss stopped the loading and three crew members came with a sledge hammer and pounded the upper lip of the flange "flush" against the coaming again. (Tr. pp. 59-60.) 3/

3/ "Q. What did they do?

"A. Well, one of them used a sledge and two of them stood by, and they took turns hitting it.

"Q. They pounded this flange back level or flush with the coaming, did they?

"A. Yes."

---Testimony of Appellee, Tr. p. 33.

"A. Yes, it hung up two or three times, I think about three times before we stopped work.

"Q. (By Mr. Larson) Did you see where the load was hanging up, what on the load was hanging up?

"A. Yes, the wire sling, the eye to the sling.

"Q. Did you see what it was catching on?

"A. Yes. It was catching on this flange that was made to hold the strongback at one time. * * *

"Q. (By Mr. Larson) Did you observe after the flange was pounded back, did you go down and take a look at it at all?

"A. No, I never went below deck. From where

(Continued)

As was made clear in the testimony, only the top portion of the flange was pounded back flush. The bottom portion was held out in part by bolts. 4/

3/ (Cont'd): we were you can see it quite plainly, and the top portion of it was back in against the coaming. "

---Witness Crumby, Tr. p.80,
emphasis added.

4/ "A. I also went down and stood side by side with the man who had the hammer while he was knocking it back flush to see that it was flush.

THE COURT: What happened to the two bolts to which the flange was attached, welded, or in whatever manner it was affixed? Did they protrude out through the flange or were they knocked down flush, too?

"A. They pursued [sic] it out through the flange, and after the flange was broke loose [i. e. , after the accident here involved] the crew members came down with a cold chisel and chiseled those bolts free.

"Q. (By Mr. Larson) How far did the bolts protrude out from the flange after it was flush with the coaming?

"A. I would say a half to three-quarters of an inch. Could be an inch.

"Q. Had similar protrusions existed before the flange had pulled away from the coaming?

"A. What's that again?

"Q. Was the bolt protrusion then about the same distance as it had been before the flange pulled away?

"A. That's correct. * * *

THE COURT: How in the world did it go back flush then unless you drove the pin to which it was attached right into the tank?

"A. They only drove the top part back flush.
The rest of it stood.

(Continued)

After the flange was pounded back, the loading proceeded. The rigging gear and wires continued to strike against and drag over the flange and coaming--because of the narrow hatch area and the continued use of the same loading method. 5/

Finally, after about five or six more loads, the top portion of the flange was broken off by a descending load and fell and injured Appellee. 6/

4/ (Cont'd): THE COURT: Oh, I see. The whole flange wasn't flush.

"A. No, sir, just the top half, or the top third."

---Witness Hansen, Tr. p. 60, line 6 to p. 61, line 1, and p. 62, line 18 to p. 63, line 1, emphasis added.

5/ "Q. Did any of the loads, apart from hanging up did any of the pallets themselves strike the coaming or the flange after you resumed work [following the pounding of part of the flange flush against the coaming] and before the accident?

"A. Well, working in that small hatch it just about hits some part of the coaming or some part of the tank going down, getting into that small opening just about each and every load will swing a little one way or the other.

"Q. And therefore bang up against the coaming?

"A. These were package loads and we lost very few bricks. We did drop a few bricks, but very few."

---Witness Hansen, Tr. pp. 67-68.

6/ "Q. Then how many pallet loads were dropped into the hold after the pounding had been completed and before the accident in question?

"A. I would say we worked about thirty minutes or five or six loads * * *

THE COURT: Did you see the flange spring loose?

(Continued)

The trial court found in Finding No. 3 (R. 49) that the flange "at the time of the accident was protruding into the working area which was narrow and confined", and in Finding No. 4 (R. 49), "That by reason of said flange protruding into said working area, the SS San Luciano was in an unseaworthy condition."

Appellant attacks these Findings as unsupported by the evidence and inconsistent with certain Supplemental Findings between Appellant and the longshoreman company unloading the vessel, CRESCENT WHARF & WAREHOUSE COMPANY (hereinafter called CRESCENT).

6/ (Cont'd): "A. I was standing side by side with the man. I didn't see the flange in the air, it happened so quick, but the man told me he was struck in the head and his hat was laying on the deck and I saw blood coming from his scalp.

"Q. (By Mr. Larson) Were you able to tell that the load had hung up just prior to the time?

"A. Oh, that's correct, but it was too late then."

---Witness Hansen, Tr. pp. 65-66.

ARGUMENT

I

THE FINDINGS THAT THE FLANGE PRO-
TRUDED INTO THE WORKING AREA AND
CAUSED UNSEAWORTHINESS WERE AMPLY
SUPPORTED BY THE EVIDENCE.

Appellant contends that Finding No. 3 that the flange "at the time of the accident was protruding into the working area which was narrow and confined" and Finding No. 4 that by reason thereof the vessel "was in an unseaworthy condition" are "clearly erroneous" because unsupported by the evidence and because claimedly in conflict with Supplemental Finding No. 8 (R. 54) 7/ that after the pounding and before the accident "the flange was then against the coaming and in the identical position it had been in at the commencement of [the] loading operation." Appellant urges the finding in Supplemental Finding No. 8 that the flange before the accident "was then flush against the coaming" means it was not "protruding into the working area" and that the Findings are thus in conflict.

Actually the two Findings are in no conflict and Findings No. 3 and No. 4 that the flange at all times protruded into the hatch area and by the danger caused thereby rendered the vessel

7/ The Findings (R. 48) were made in the basic action between Appellee-Plaintiff and Appellant (shipowner). The Supplemental Findings (R. 52) were not subsequent or amendatory but were made concurrently in the indemnification cross-action between the Appellant (shipowner) and CRESCENT, the stevedore company.

unseaworthy are fully supported by the evidence as martialled above in detail in the Statement of the Case.

Appellant stresses that Supplemental Finding No. 8 finds the flange at the time of the accident "was then flush against the coaming" and in the "identical position it had been in at the commencement of said loading operations." It urges being "flush against the coaming" negates any "protrusion". The true conclusion is quite the contrary; being "flush against the coaming" still leaves the flange protruding to the hatch area by its own width or thickness since it was fastened to the hatch coaming, not embedded therein.

There is no evidence the flange was inlaid; by all of the evidence it was "flush against", not set into, the coaming--precisely as Supplemental Finding No. 8 itself squarely states and as was testified by all of the witnesses. So stated Appellee as a witness ("level or flush with the coaming", Tr. p. 33); so stated the witness Hansen ("flush against the coaming" and "no space between the flange and the coaming", Tr. p. 52); and so stated the witness Crumby ("against the coaming", Tr. p. 80).

Moreover, even after the crew had pounded back the upper lip of the flange after three loads had "hung up" thereon, the bottom portion of the flange protruded particularly into the hatch area because held partly out by certain bolts. Witness:

"A. I also went down and stood side by side with the man who had the hammer while he was knocking it back flush to see that it was flush. * * *

"Q. (By Mr. Larson) How far did the bolts protrude out from the flange after it was flush with the coaming?

"A. I would say a half to three-quarters of an inch. Could be an inch. * * *

"THE COURT: How in the world did it go back flush then unless you drove the pin to which it was attached right into the tank?

"A. They only drove the top part back flush. The rest of it stood.

"THE COURT: Oh, I see. The whole flange wasn't flush.

"A. No, sir, just the top half, or the top third."

---Witness Hansen, p. 60, lines
6-20, and p. 62, line 18 to p. 63,
line 1.

The short of it is that precisely because of its location, fastened against the coaming and thereby protruding by its own dimensions into the narrow hatch working area, the flange was continuously vulnerable to being struck or dragged against by the gear and rigging lowering the pallets, creating an inherent unseaworthy danger which was aggravated by the loading method necessary to lower the pallets into the deep tank hatch.

"A. As we come in the hold we naturally come in on practically two falls until we get down to the shaft alley, get down into the tween deck, and then we slack it

over onto the yard fall only in order to clear the shaft alley, so that it was the yard fall that was hanging all the time.

"Q. So that as you slacked over to the yard fall, that caused the pallet load to swing in the direction of the coaming where the flanges were?

"A. That is the only way you can bring the load in without capsizing the load and hitting the shaft alley which comes out three feet.

"Q. But that was the effect of slacking off on the midship fall?

"A. That is the way we rigged our gear all the time for that tank. "

---Witness Hansen, pp. 57-58,
emphasis added.

Thus the findings are in no true conflict, and Findings No. 3 and No. 4 that the flange which caused the accident protruded into the hatch work area at the time of the accident and by doing so created unseaworthy danger were amply supported by the evidence. It was without dispute, and conceded, that the two flanges were unnecessary and useless to the vessel and were to secure strongbacks long previously abandoned in use (Tr. p. 53, lines 1-4; p. 80, lines 8-9; p. 28, line 3; p. 3, lines 8-12), and by their very location on the side of the hatch coaming in the narrow hatch loading opening, they constituted a continuing unseaworthy and unnecessary loading danger and hazard.

Additionally, as to the claim of conflict in the findings, Supplemental Finding No. 8 (relied upon by Appellant) finds that the accident happened when "the loading gear struck or caught said flange causing a part of it to break off and fall and strike plaintiff." (R. 54.) This confirms, not conflicts with, the declaration in Finding No. 3 that the flange was "protruding" into the hatch opening at the time of the accident. To be "struck or caught" by the loading gear implies some degree of protrusion to cause the striking or catching.

In fine, the findings in whole are in no conflict and clearly establish unseaworthiness. It is elementary that findings are to be liberally construed to support a judgment and are to be reconciled and harmonized in their reading by all reasonable efforts of construction. (3 Am. Jur. 462-463; 53 Am. Jur. 795, 798.)

Moreover, as seen in detail in The Statement Of The Case and as reviewed above, the findings are clearly and amply supported by the evidence. Upon appeal findings will not be set aside as unsupported by the evidence unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (United States v. United States Gypsum Co., 333 U.S. 364, 395.) This is the test under the "clearly erroneous" requirement of Rule 52(a), Federal Rules of Civil Procedure, and it applies as well in admiralty as in all other federal proceedings. (Guzman v. Pichirillo, 369 U.S. 698, 702.)

At bar the two flanges, useless in function and located on the coaming of the narrow tween decks hatch, were by their location at all times and continuously in risk of being struck, dragged over or caught against by the gear and rigging lowering the pallet loads. The danger thereby created was a continuing and constant condition of unseaworthiness. It existed when the loading first commenced--witness the three "hung up" loads. It continued to exist thereafter after the flange was pounded back against the coaming again--witness the accident to Appellee which followed. The danger was continuous and arose from the hazardous location of the useless flanges, and under the evidence the finding of unseaworthiness was virtually compelled.

Indeed, unseaworthiness in the premises of the accident was largely if not totally conceded by Appellant to the trial court and counsel below. At the outset of the trial, Mr. Lawrence J. Larson, Esq., representing Appellant, exchanged comments with Court and counsel as follows:

"THE COURT: I think in the Noriega case it was agreed, was it not, that the plaintiff would go ahead and put on his testimony as to damages, whereupon the burden shifts to you, Mr. Larson.

"MR. LARSON: Yes, your Honor. * * *

"MR. BROWN: And, Mr. Larson, it is agreed that plaintiff need not prove negligence or unseaworthiness as against the vessel, this is admitted:

"MR. LARSON: Your Honor, I don't have the

authority to admit it. As I understood it, I will have to put the plaintiff on the stand, I will have to prove the nature of the injury. I don't take dispute with the Court's view in the statements that have been made as to whether the vessel was or was not unseaworthy, but I will have to establish the nature of the accident, the manner in which it happened, as part of our claim of contributory negligence, and it is my understanding that that is where we stood at this point.

"THE COURT: I thought when we were discussing it the other day that you were conceding the fact of established liability as against you subject to your being able to establish that the plaintiff was contributorily at fault.

"MR. LARSON: I was conceding the facts, your Honor, that this flange was not of any function or use at this point in view of the point that the vessel had been altered and that it was the flange which broke off in the course of the cargo loading and struck the plaintiff.

"THE COURT: Well, I think that establishes a prima facie case." 8/

---Tr. pp. 2-3.

Thus Appellant to Court and counsel conceded that the flange "was not of any function or use" and that it "broke off in

8/ This statement by the Court was never challenged by Appellant.



the course of the cargo loading. " Appellant's counsel further stated he did not "take dispute . . . as to whether the vessel was or was not unseaworthy" and that he would inquire into "the nature of the accident" only "as part of our claim of contributory negligence. " If this technically stops short of conceding unseaworthiness, it hardly does so in substance. In any event, whether or not conceded, the unseaworthiness of the improperly and dangerously located useless flange, protruding at all times by its own dimensions into the narrow hatch working area, was demonstrated without contest or dispute by all of the evidence, and the findings predicated thereon are clearly sustainable upon appeal.

II.

THERE IS NO ISSUE OF "INSTANT UNSEAWORTHINESS" AT BAR; THE DANGEROUS LOCATION OF THE UNNECESSARY FLANGE AND THE CONTINUING HAZARD ARISING FROM SUCH LOCATION AND FROM THE METHOD OF LOADING EMPLOYED, CREATED PLAIN AND CLEAR ANTECEDENT AND CONTINUING UNSEAWORTHINESS.

Appellant attempts to argue (Appellant's Brief, pp. 11-12, 15-23) there was no hazard from the flange at bar except when the upper lip was pulled away from the coaming. After the three loads had "hung up" on the flange and work was stopped and the upper lip pounded back flush with the coaming once again, Appellant would have it that no unseaworthiness existed until the very load that caused the accident, for that was the first load to "hang up" after

the flange was pounded back. From this Appellant would argue the cause for the breaking and falling of the flange when Appellee was injured can only have been negligence of the longshoreman company (CRESCENT) "at the very moment of injury" (Appellant's Brief, p. 14), and negligence at the very moment of accident creates only "instant unseaworthiness" for which no unseaworthiness liability arises. (Appellant's Brief, pp. 16 et seq.)

In arguing nonliability for "instant unseaworthiness" Appellant argues issues having no applicability at bar.

What Appellant overlooks completely is that the danger created by the location of the flange and by the method of loading to the deep tank (which method caused the loading gear and rigging to constantly strike and drag against the coaming and flange) was clearly a continuing, antecedent condition, and in no manner one arising only "at the very moment" of the accident. Appellant's cited cases as to "instant unseaworthiness" are therefore completely inapplicable.

The true authority applicable at bar is that of Crumady v. Joachim Hendrik Fisser, 358 U.S. 423 and Blassingill v. Waterman SS Corp. (C.A. 9, 1964), 336 F.2d 367.

The location of the flange on the hatch coaming of the narrow tween deck hatch, protruding into the hatch area by its own dimensions and exposed thereby to striking, dragging and catching by the loading gear and rigging, created in se a continuing unseaworthy condition likely to be "brought into play" by loading operations to the deep tank at any time. The danger of the flange

was, therefore, an "unseaworthy condition of the vessel" likely to be "brought into play" by loading or unloading operations at any time akin entirely to the danger of the improper winch safety adjustment in Crumady (358 U.S. at p. 427).

Moreover, the danger of the hazardously-located flange was aggravated by the unsafe method of loading employed by CRESCENT within the rule and principle of Blassingill. To avoid the shaft alley the load was consistently pulled sharply inshore by one rope of the rigging, and this consistently caused the rigging and gear to strike against and drag over the coaming and the flange. The testimony was clear:

"A. As we come in the hold we naturally come in on practically two falls until we get down to the shaft alley, get down into the tween deck, and then we slack it over onto the yard fall only in order to clear the shaft alley, so that it was the yard fall that was hanging all the time.

"Q. So that as you slacked over to the yard fall, that caused the pallet load to swing in the direction of the coaming where the flanges were?

"A. That is the only way you can bring the load in without capsizing the load and hitting the shaft alley which comes out three feet. . . . That is the way we rigged our gear all the time for that tank."

---Witness Hansen, pp. 57-58,
emphasis added.

"Q. (By Mr. Larson) Did you observe whether any of the bridle or any part of the rigging came in contact with the flange on the strongback after it was pounded back but before the accident to Mr. Noriega?

"A. Oh. Well, yes, it's impossible to get a load in. It hangs directly in the center of the opening and the opening is so small, that's the only place you can have your gear rigged, is directly over this flange, and in order to get the load in it has to come in contact with that flange."

---Witness Crumby, p. 81,
emphasis added.

This Court's holding in Blassingill is specific and direct that an "unsafe method" of loading adopted by a stevedoring company can "render [a] vessel 'unseaworthy' ". (Blassingill v. Waterman SS Corp., supra, 336 F.2d 367, 368 and f.n. 1; accord: Morales v. City of Galveston, 370 U.S. 165, 170; Knox v. United States Lines Co. (C. A. 3, 1961), 294 F.2d 354; Ballwanz v. Isthmian Lines, Inc. (C. A. 4, 1963), 319 F.2d 457; Strika v. Netherlands Ministry of Traffic (C. A. 2, 1950), 185 F.2d 555 and Robillard v. A. L. Burbank Co. (U.S.D.C.S.D. N.Y., 1960), 186 F.Supp. 193.) Hence the finding of unseaworthiness at bar is confirmed by the aggravated danger of the flange caused by the method of loading adopted and employed by the stevedoring company. This emphasizes that the unseaworthiness at bar was not "instant unseaworthiness" arising out of isolated negligence "at the very moment of the injury",

but arose from continuous conditions and circumstances of hazard existing antecedent to the accident and erecting constant and continuous danger.

CONCLUSION

WHEREFORE, upon all of the reasons and considerations above stated, the judgment below in favor of Appellee should be affirmed.

Respectfully submitted,

NEWTON R. BROWN and

MARGOLIS & McTERNAN

By: BEN MARGOLIS

Attorneys for Plaintiff and Appellee.

WILLIAM B. MURRISH,

Of Counsel.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ben Margolis

BEN MARGOLIS

No. 20193
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S.A.,
Appellant-Defendant and Third Party Plaintiff,

vs.

BERNARD A. NORIEGA,

Appellee-Plaintiff,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation,

Appellant-Third Party Defendant.

OPENING BRIEF OF APPELLANT CRES-
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Appellee-Plaintiff,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation,

Appellant-Third Party Defendant.

OPENING BRIEF OF APPELLANT CRESCENT WHARF & WAREHOUSE COMPANY.

Jurisdiction and Background.

The action was brought by Bernard A. Noriega, the appellee-plaintiff, for personal injuries received while he was working as a longshoreman against appellant Compania Naviera De Baja California, S.A., a corporation, hereinafter called "Compania." Noriega was an employee of Crescent Wharf & Warehouse Company, a corporation, appellant-third party defendant, hereinafter referred to as "Stevedore Company," at the time of his injury on board the "SAN LUCIANO" on April 18, 1963. The action, being based on maritime tort, is

within the admiralty and maritime jurisdiction of the District Court of the United States (28 United States Code Sec. 1333), the plaintiff Noriega having brought his action on the civil side of the United States District Court under 28 United States Code Sec. 1332. Compania answered the complaint and brought a third party complaint against the Stevedore Company seeking indemnity over. The Stevedore Company answered the third party complaint setting up a special defense [R. p. 23] of a failure on the part of Compania to have used ordinary care to provide a vessel, gear and equipment in such a condition that the Stevedore Company would be able to load the vessel with reasonable safety. The matter was tried without a jury and the District Court ordered judgment in favor of the plaintiff Noriega against Compania in the amount of \$50,516.90 with interest together with costs [R. p. 52] and the Court concluded that Compania was entitled to recover from the Stevedore Company indemnity in said sum plus \$2,000.00 attorneys fees and costs [R. 55]. Notice of Appeal was given by the Stevedore Company on March 10, 1965 [R. 59] insofar as the indemnity judgment was concerned.

Statement of the Case.

On April 18, 1963 the Stevedore Company employees were on board the "SAN LUCIANO" for the purpose of loading bricks [Tr. p. 19, lines 14-16] and the plaintiff Noriega was on board as an employee of the Stevedore Company [Tr. p. 19, lines 12-13]. The hold in which the bricks were being loaded was divided by a fore and aft bulkhead [Tr. p. 22, lines 17-19] and the hatch opening through which the pallets loaded with bricks were being brought on board was about six feet by ten

feet [Tr. p. 23, lines 1-10]. There was a shaft alley in the hold and it was necessary with the narrow opening to swing the load somewhat in order to miss the shaft alley [Tr. p. 24, lines 1-12] and in order to get the loads in, the gear had to come in contact with a flange [Tr. p. 81, lines 5-19]. If the load were allowed to come directly down through the hatch opening it would hit the shaft alley so that it was necessary and unavoidable that the yard fall would rub against the edges of the coaming on the 'tween deck hatch, and the only manner in which the load could have been brought in without capsizing and hitting the shaft alley was the method being used by the longshoremen [Tr. p. 58, lines 2-7] and such was the only practical way in which the work could be done [Tr. p. 68, line 10, to p. 69, line 5]. The flange had no function or use on board the vessel [Tr. p. 3, lines 8-12]. The morning of the accident there had been three or four loads hung up on the flange [Tr. p. 53, lines 22-25] resulting in bricks falling from the pallet boards [Tr. p. 27, lines 18-25]. The Stevedore Company boss, Hansen, stopped the work and went to the first mate of the vessel, brought him back to the hatch, showed him the danger and told him that the loads were hanging up and that it had to be corrected [Tr. p. 59, lines 3-20; p. 58, lines 13-16]. The first mate (chief mate) had the crew members take a sledgehammer and they apparently repaired the situation [Tr. p. 59, lines 22-23; p. 60, lines 6-8]. All of the persons involved in the repair work were members of the ship's crew acting under the orders of the first mate [Tr. p. 73, lines 16-24]. After the crew members hammered the flange back flush with the coaming they stated in Spanish that it was "all right" or "all ready" [Tr. p. 43, line 12, to p. 44, line 5] and it appeared both to the first mate of

the vessel and to the Stevedore Company boss that the flange was safe [Tr. p. 65, lines 1-11]. The Stevedore Company boss looked at the flange after it was hammered back in and checked for any cracks. None was seen [Tr. p. 65, lines 12-17]. It did not appear to the Stevedore Company boss that there was any weld broken in the flange [Tr. p. 62, lines 9-17] and the flange appeared to be safe [Tr. p. 73, line 25, to p. 74, line 4]. When the crew had apparently rectified the situation there was no indication to the Stevedore Company boss that the flange had been loosened, since it was both welded and bolted to the coaming [Tr. p. 62, lines 9-12]. It was just the top part of the flange which had been loose, as the rest was permanently affixed to the coaming [Tr. p. 64, lines 11-14]. When the plaintiff was struck, he was struck only with the top part of the flange, the rest of the flange having to be chiseled off by the crew after the accident [Tr. p. 62, line 18, to p. 63, line 17; p. 64, lines 5-14]. The work resumed after the delay to repair the condition and another five or six loads were brought in before the injury to the plaintiff [Tr. p. 65, lines 18-22]. There was no load that hung up at the time the flange came loose [Tr. p. 66, lines 8-9; p. 81, lines 15-19; p. 81, line 24, to p. 82, line 4 p. 82, lines 19-22]. There was nothing on the gear which caught the flange at the time of the accident as the only contact was the usual one of dragging and rubbing the blacksmith and the wires across the coaming [Tr. p. 82, lines 5-8; p. 84, lines 6-11] and the flange was still flush with the coaming [Tr. p. 67, line 24]. No bricks fell at the time of the accident, there appeared to be nothing wrong with the load and there was no mishap of any kind insofar as the load was concerned at the time of the accident [Tr. p. 84, lines 12-23].

**Specification of Errors Relied Upon by Third Party
Defendant Crescent Wharf and Warehouse
Company, Appellant.**

Appellant Stevedore Company urges the errors specified as follows:

1. That the Court erred in finding [Find. of Fact 5; R. p. 53] that the Stevedore Company *negligently* allowed the gear to strike a metal flange on the vessel.

2. That the Court erred in finding [Find. of Fact 8; R. p. 54] that the loading gear struck or caught the flange causing a part of it to break off and strike the plaintiff.

3. That the Court erred in finding [Find. of Fact 11; R. pp. 54-55] that the Stevedore Company was negligent and had breached its duty to do its stevedoring services in a workmanlike manner by causing or permitting the loading gear to strike or to catch on the said flange and by failing to properly supervise the loading operations and by failing to conduct the loading in such a manner as to avoid unnecessary risks to the plaintiff and that such negligence and breach of warranty caused the unseaworthiness of the vessel and were the proximate causes of the injury to the plaintiff.

4. That the Court erred in finding [Find. of Fact 11; R. p. 55] in effect that it was not true that the shipowner Compania breached its obligations to the Stevedore Company to have the vessel and its gear and equipment in such a condition that the Stevedore Company by the use of ordinary care would be able to load the vessel with reasonable safety (this is the second and separate defense in the Stevedore Company's answer at page 23 of the Record).

ARGUMENT.

There was no material conflict in the evidence at the trial and accordingly it would appear fortunate that this appeal will be purely a matter of law based on uncontradicted evidence rather than on the weighing of any conflicting evidence.

The burden of proof on the indemnity action contained in the third party complaint is on the shipowner Compania as against the Stevedore Company, Crescent Wharf & Warehouse Company. The shipowner must prove the following, in order to recover indemnity:

1. *That the stevedoring company breached its implied contractual obligation to do its work with reasonable safety; and*

2. *That the shipowner did not breach its implied contractual obligation to exercise ordinary care to put the vessel, its gear and equipment in such a condition that an experienced stevedoring company would be able by the use of ordinary care to load cargo with reasonable safety to persons.*

Each of the above will be discussed separately as follows:

1. Did the Stevedore Company Breach Its Implied Contractual Obligation?

First of all, the stevedore company's obligation is not to do its work in an *absolutely safe manner*, the only obligation it has is to do its work with "*reasonable safety*." This obligation is clearly set out by the United States Supreme Court in the case of *Ryan Stevedore Company v. Pan-Atlantic Steamship Company*, 350 U.S. 124 at pages 131 and 132;

“The third party complaint is grounded upon the contractor’s breach of its purely consensual obligation owing to the shipowner to stow the cargo *in a reasonably safe manner*.” (emphasis added).

This language was construed again by the United States Supreme Court in the case of *Weyerhaeuser Steamship Company v. Nacirema Operating Company*, 355 U.S. 563 at 565, as being a contractual undertaking to perform *with reasonable safety*.

Because of the very definition of the stevedore company’s implied obligation as one of reasonable safety, we must look to the conditions as they appeared to the Stevedore Company personnel at the time of the injury in order to determine whether their conduct was reasonably safe under the circumstances. To analyze the circumstances, it must be noted that there was no evidence whatsoever in the entire record which would indicate that there was any other way, manner or method in which the Stevedoring Company could have loaded this cargo (thus complying with its contractual obligation to load the vessel) other than the way in which it was being done by the Stevedore Company at the time involved. Neither the plaintiff nor the shipowner produced any evidence whatsoever to the contrary in spite of the shipowner’s burden of proof to show a breach of contract on the part of the Stevedore Company. It was testified to without contradiction that there was a shaft alley in the hatch involved, that the loads of brick had to be brought through a small hatch opening which was a part of the permanent structure of the vessel; and that in having to come down with the loads through the narrow hatch and to avoid spilling the brick by hitting the shaft alley, the loads had to go to one side which, of

course, would cause the cargo gear to rub on the hatch coaming where the useless flanges were located. The Stevedore Company boss Hansen stopped work when he saw that the flange, having protruded, presented a dangerous situation. He requested the first mate to have it fixed. The first mate undertook the responsibility, through the ship's personnel, to rectify the situation and although the flange appeared, thereafter, to be safe both to the ship's personnel and to the stevedore personnel, in fact the first mate did not rectify the situation, in that the flange itself had, apparently by the hammering, been made weak or broken so that it sprang or fell off, as different from the previous difficulty they had had of the loads catching and spilling brick.

With regard to the catching of loads, the flange, after the repair, was in fact safe as no load thereafter hung up. The load which was being brought in at the time the flange either sprang loose or fell did not catch up on the flange and the winchdriver who was actually handling the load states that there was nothing wrong with the load in the way it came into the hatch and that he knew of nothing that was out of the usual until he had been informed that the plaintiff had been injured. This fact is borne out by the testimony that the load which was involved at the time of the plaintiff's injury, had come into the hold and was lower than the three previous loads had been when they had tipped and spilled before the attempted repair [Tr. p. 37, lines 10-15]. This must lead to the conclusion that the blacksmith and the load itself had cleared the flange without any difficulty at the time of the accident.

There is no evidence of any kind that the flange again, at any time after it was hammered in, came out or protruded until it came out and immediately struck

the plaintiff. It could have been broken by the hammering or could have been hammered in in such a manner that it created a tension which caused it to spring loose either of its own accord or by the rubbing of the winch falls on the hatch coaming. In any event, *there was no indication of any kind to the Stevedore Company that the flange itself would come out and fall.* The Stevedore Company boss examined it after the hammering, there appeared to be no crack in it and it appeared to be safe.

There is no question but that the vessel was unseaworthy because of the flange, which either originally or by reason of the crew having worked on it, was placed in such a condition that it sprang or fell from its location. It may very well be, although this is denied by the Stevedore Company, that the shipowner was not guilty of negligence but, of course, unseaworthiness may exist without any negligence on the part of the shipowner.

However, with regard to the action of the shipowner against the Stevedore Company for indemnity, there must be some act on the part of the stevedore personnel which was not reasonable under the circumstances and there is no evidence thereof.

2. Did the Shipowner Breach Its Implied Contractual Obligations to the Stevedore Company and Were the Actions of the Shipowner Such as Would Preclude Recovery of Indemnity?

The shipowner may not recover indemnity for a breach by the stevedoring company of its obligations if the shipowner itself has been guilty of a material breach of the contract.

The basis for this doctrine is contained in the decision of the United States Supreme Court in the case of

Weyerhaeuser Steamship Company v. Nacirema Operating Company, 355 U.S. 563 at 567, where the Court states:

“If in that regard respondent (Stevedore Company) rendered a substandard performance which lead to foreseeable liability of petitioner (shipowner), the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*” (emphasis and material in parentheses added).

This language was inferentially interpreted by United States Court of Appeals for the Second Circuit in 1962 as meaning that a material breach of the contract by the shipowner would preclude it from recovering indemnity for a breach by the stevedoring company, that Court stating on page 154 of its decision in *Pettus v. Grace Line v. Sealand Dock & Terminal Company*, 305 F. 2d 151:

“To be sure, since the claim for indemnity is based on the stevedoring contract, a material breach of that contract by Grace Line would preclude its enforcing the contract to recover indemnity.”

That this is the law in the Ninth Circuit appears to be confirmed by the case of *Hugcev v. Dampks, etc.*, 170 F. Supp. 601 (affirmed 274 F. 2d 875), where the Court at page 608 sets out the position that the shipowner cannot recover if it has been guilty of a material breach of the contract. This is the ordinary contract law to the effect that one who seeks to recover damages for a breach of contract must prove that he himself has complied with his obligations thereunder. This has been recognized in the approved Jury Instructions set forth in 28 Federal Rules Decisions at pages 547-549.

It would appear certain that if there were ever a case in which the conduct of the shipowner was such as to preclude its recovery of indemnity from the stevedore company, the case at bar is it. We have, first of all, the fact that we are dealing solely with ship's equipment and there is no element, as there often is, of equipment being brought on board the vessel by the stevedore company. Further, we have the stevedore company halting its operations and specifically requesting the shipowner to rectify and correct the dangerous condition. The stevedore company certainly does not have either the obligation nor the right to make repairs to the ship. This is purely the responsibility of the shipowner. We then have the shipowner acting through the mate and the crew members undertaking to correct the situation presented by the defective ship's equipment. Even though both the ship's officer and the stevedore boss were apparently satisfied that the matter had been corrected and was safe, it seems patent it was not in fact safe. Since the dangerous condition was a part of the ship itself and the stevedore company had no right nor obligation to correct it, the stevedore company had only the obligation to stop work, draw it to the attention of the ship and not recommence work until it was apparently corrected.

The essence of this situation is that even though the ship's personnel may have attempted to take the necessary steps to correct the situation, the fact is that they did not correct it and such constitutes conduct on the part of the ship, which was in charge of the work of repair to its own equipment, that would preclude recovery of indemnity.

Conclusion.

It is respectfully urged that the third party judgment in favor of the shipowner Compania against the Stevedore Company, Crescent Wharf & Warehouse Company, should be reversed for the reason that the shipowner did not meet its burden of proving:

1. That the Stevedore Company failed to do its work in a reasonably safe manner, and
2. That the shipowner was not guilty of conduct which would preclude its recovery of indemnity even if the Stevedore Company in fact did breach its contract.

Respectfully submitted,

SIKES, PINNEY AND MATTHEW,

By ROBERT SIKES,

*Attorneys for Crescent Wharf &
Warehouse Company, a corpo-
ration, Appellant-Third Party
Defendant.*

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT SIKES



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A.,)

Appellant - Defendant and)
Third Party Plaintiff,)

vs.)

BERNARD A. NORIEGA,)

Appellee - Plaintiff,)

vs.)

CRESCENT WHARF & WAREHOUSE COMPANY, a)

corporation,)

Appellant - Third Party Defendant.)

CLOSING BRIEF OF APPELLANT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A.

OVERTON, LYMAN & PRINCE

Attorneys for COMPANIA NAVIERA
DE BAJA CALIFORNIA, S. A.

The heart of appellant's appeal is predicated upon the contention that the vessel's unseaworthiness was caused instantaneously with the incident giving rise to plaintiff's injury.

Appellee takes issue with appellant's position on four grounds. We will deal with each point separately.

I

APPELLEE'S POINT I

Appellee justifies Finding No. 3 by a reference to evidence that the flange protruded into the hatch by its own thickness (three-sixteenths of an inch). Logically, this is not what the court had in mind. The ordinary lap of welded plates will protrude by a half inch or so. The court had in mind the protrusion caused when the flange was caught or struck by the pallet or pallet bridle at the time of the casualty.

This is evident by the court's remarks that:

"The flange was not dangerous in and of itself, however. It became so only during the course of a cargo operation." (Tr. Page 111, lines 8-9)

II

APPELLEE'S POINT II

Appellee justifies Finding No. 3 with the argument

that the location of the flange was objectionable. His only support for this argument was a portion of the testimony of witness Hansen that slacking the loads toward the flange was "the only way you can bring the load in"

(Appellee's Brief Page 12.) However, the court rejected this theory saying:

"The court is satisfied that there were undoubtedly other methods of loading which could have been employed with the flange in place, although they may have been slower and more costly."

[Emphasis added.] (Tr. Page 112, Lines 16-19.)

Appellee further argues:

"It was . . . conceded that the two flanges. . . by their very location on the side of the hatch coaming . . . constituted a continuing unseaworthy and unnecessary loading danger and hazard."

(Appellee's Brief Page 12.)

No such concession, as alleged in the last quoted sentence, appears anywhere in the record. Furthermore, the court stated:

"The flange was not dangerous in and of itself" (Tr. Page 111, Line 8); and

". . . it is my view that when he rectified that condition to your satisfaction, that from that time on the loading was not dangerous in and of itself."

[Emphasis added.] (Tr. Page 114, Lines 9-12.)

III

APPELLEE'S POINT III

Appellee claims appellant conceded unseaworthiness.

Had that been so, the trial would have been limited to the issue of damages. A close reading of the portions of the record quoted from pages 14-16 of appellee's brief indicates no such concession was made. As counsel for appellant stated:

"Your Honor, I don't have the authority to admit it." (Tr. Page 2, Lines 18-19.)

IV

APPELLEE'S POINT IV

Appellee also contends the vessel was unseaworthy by reason of the method of loading adopted by the stevedore. Appellant dealt with this issue on pages 20-23 of its opening brief.

V

CONCLUSION

WHEREFORE, appellant contends the judgment below in favor of appellee BERNARD A. NORIEGA should be reversed.

Dated: October 25, 1965.

OVERTON, LYMAN & PRINCE
DAN BRENNAN
JEROME O. HUGHEY

By 

Dan Brennan

Attorneys for COMPANIA NAVIERA
DE BAJA CALIFORNIA, S.A.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Dan Brennan

No. 20193

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMPANIA NAVIERA DE BAJA CALIFORNIA,

S. A.,

Appellant - Defendant and
Third Party Plaintiff,

vs.

BERNARD A. NORIEGA,

Appellee - Plaintiff,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY,

a corporation,

Appellant - Third Party Defendant.

BRIEF OF APPELLANT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A.

FILED

SEP 10 1965

THOMAS D. HARRIS, CLERK

OVERTON, LYMAN & PRINCE,

Attorneys for COMPANIA NAVIERA DE
BAJA CALIFORNIA, S. A.

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STATEMENT OF THE CASE1. Jurisdiction.

This is an appeal by defendant appellant COMPANIA NAVIERA DE BAJA CALIFORNIA, S.A. (hereinafter called "COMPANIA") from a final judgment in favor of plaintiff appellee BERNARD A. NORIEGA (hereinafter called "NORIEGA"). NORIEGA's cause of action for personal injury was based on the general maritime law and jurisdiction of the District Court was founded on 28 U.S.C. Section 1332. This court's jurisdiction arises under the provisions of 28 U.S.C. Section 1291.

2. The Proceeding Below.a. The Material Pleadings.

NORIEGA filed his complaint (No. 63-679-S) seeking damages for personal injury allegedly occurring April 18, 1963, on board COMPANIA's vessel, the SS "SAN LUCIANO" (hereinafter called "vessel"). The alleged injury having occurred upon navigable waters (admitted Fact No. 7, p. 3, Pre-Trial Conference Order, R. 41), NORIEGA based his cause of action on the general maritime law, including negligence and breach of the warranty of seaworthiness. October 1, 1963, COMPANIA filed its answer (R. 7) denying the allegations of NORIEGA's complaint and setting up contributory negligence and assumption of risk as affirmative defenses.

On October 9, 1963, COMPANIA filed a third party complaint (R. 12) against NORIEGA's employer CRESCENT WHARF & WAREHOUSE

COMPANY (hereinafter called "CRESCENT"). CRESCENT was COMPANIA's contract stevedoring firm loading the vessel at the time of the injury. COMPANIA, alleging CRESCENT was negligent and breached its warranty of workmanlike service, sought indemnity for any liability it might have to NORIEGA, plus reasonable attorneys' fees and costs incurred in defending against NORIEGA. CRESCENT filed its answer (R. 22) November 6, 1963.

The case came on for trial without a jury on February 23, 1965, and the final judgment here appealed from was entered in favor of NORIEGA against COMPANIA on March 2, 1965 (R. 51). Of principal concern in the appeal of the judgment in favor of NORIEGA¹ is Findings of Fact Nos. 3 and 4 and Supplementary Findings Nos. 5, 6, 8 and 11, entered March 2, 1965 (R. 48) respecting the vessel's seaworthiness.

b. The Material Facts.

1. Summary.

The accident occurred aboard the "SAN LUCIANO", a Mexican freighter, at 11:20 A.M. on April 18, 1963 (Tr. p. 20). At about 8:00 A.M. CRESCENT, COMPANIA's contract stevedoring company, boarded the "SAN LUCIANO" for the purpose of loading pallets of bricks into the starboard side of No. 3 lower hold, known as the No. 3 starboard deep tank (Tr. p. 19).

¹CRESCENT is appealing the judgment entered against it in the third party action and the issues pertaining thereto will be briefed by COMPANIA in its reply to CRESCENT's opening brief.



CRESCENT, which had worked the ship on dozens of previous occasions, rigged the ship's gear and proceeded to load into the hold (Tr. p. 48). The hold had at one time been divided into a tween deck and a lower hold by means of strongbacks. The tween deck hatchcoaming was affixed with sockets which had formerly supported the strongbacks. These sockets were also referred to by the witnesses as strongback slots (Tr. pp. 51 and 52). The strongback sockets were inspected by CRESCENT and found to be secure and flush against the coaming at the onset of loading (Tr. pp. 52 and 53). During the course of the morning, three or four loads hung up on a strongback socket (Tr. p. 53). The loads were running close to 2100 lbs. (Tr. p. 55). As a consequence of the loads hanging up on a strongback socket, the socket started to open up and all loads commenced to hang up (Tr. p. 56). The longshoremen, at the direction of Mr. Hansen, the hatch boss for CRESCENT, stopped work (Tr. P. 58). The ship's crew then proceeded to hammer the bent flange of the socket back flush against the coaming (Tr. p. 59). CRESCENT's hatch boss stood by while crew members drove the flange flush against the coaming (Tr. p. 60). Prior to resumption of work the hatch boss made a personal inspection of the repaired flange (Tr. p. 61), ascertained that it looked perfect (Tr. p. 62) and upon checking it determined that the weld holding it had not broken (Tr. p. 62, Tr. p. 65, lines 12-17). The hatch tender for CRESCENT determined that the sledge hammering of the fitting had placed it back against the coaming in the same position as



when work had commenced that morning (Tr. p. 83). After making an inspection of the socket, CRESCENT resumed loading (Tr. p. 64, line 22 - p. 65, line 2) and continued for the next thirty minutes or so without incident (Tr. p. 66, lines 21-23), when CRESCENT negligently allowed a load of bricks to rub and chafe the socket (Tr. p. 84, lines 1-11), this time tearing a piece loose which struck the plaintiff.

2. The Findings.

Finding No. 3 states that the metal flange "at the time of the accident was protruding into the working area" (emphasis supplied). Finding No. 4 states that by reason of the protrusion the "SAN LUCIANO" was unseaworthy. It is apparent from the evidence and Supplemental Finding No. 8 that this protrusion and unseaworthiness were created instantaneously with the accident.

Supplemental Finding No. 5 indicates that prior to the accident the metal flange was bent "outward" by CRESCENT's allowing "the pallet or pallet bridle gear to catch or strike [said] metal flange". However, this condition was fixed prior to the accident.

Supplemental Finding No. 6 states:

"Thereafter [after the initial bending out], crew members of the ship pounded the bent flange back flush against the coaming to its original position."

Supplemental Finding No. 8 states:

"On completion of the pounding referred to above,

the flange was then flush against the coaming and in the identical position it had been in at the commencement of said loading operation."

The Finding goes on to state:

". . . thereafter the hatch tender . . . recommenced loading Shortly thereafter . . . the loading gear struck or caught said flange causing a part of it to break off and fall and strike plaintiff. . . ."
(Emphasis supplied.)

Supplemental Finding No. 11 states:

"CRESCENT was negligent and breached its duty to render its stevedoring services in a workmanlike manner by causing or permitting the loading gear to strike or catch on said flange. . . ."

3. The Testimony.

Supplemental Finding Nos. 5, 6, 8 and 11 are supported by the following testimony.

HANSEN, the hatchtender for CRESCENT, testified as follows:

Tr. p. 51, line 25 to Tr. p. 52, line 17:

Q: Did you notice either on that occasion or any prior occasion a strongback at the site of the tween decks hatch?

A: Strongback slots.

Q: Strongback slots?

A: Yes, sir.

Q: And composed of double flanges, a flange on either side of the slot?

A: Flanges.

Q: Did you notice that when you came first on board that day and opened the hatch?

A: I knew they were there, yes.

Q: Did they appear to be in any different condition than they had been on prior occasions?

A: No, sir.

Q: Were both flanges before work started on that day flush against the coaming?

A: They were.

Tr. p. 53, lines 5-8:

Q: (By Mr. Larson): But at the time you commenced loading operations on the day in question they were both flush against the coaming?

A: They were.

Tr. p. 53, line 22 to Tr. p. 54, line 7:

Q: Prior to the time of the accident had anything hung up or caught on the flanges which were creating this socket, the strongback socket?

A: I would say about three or four loads did hang up.

Q: And what portion of the load was hanging up?

A: We were using twenty foot wire straps doubled

up, with say all four eyes on the blacksmith or the ship's hook, and as we lowered down and the eye right next to the blacksmith would catch the flange and the load would hang up partially and then it would give a jerk when it freed itself.

Tr. p. 56, lines 3-5:

Q: At any point did you notice that one of these flanges became bent out from the coaming?

A: I did.

Tr. p. 57, lines 1-4:

A: . . . The operation worked quite smoothly until the flange started to open, and as soon as the flange opened where the loads hung up I would say three times, I stopped the work.

Tr. p. 59, lines 1-4:

A: I knew the flange was there at all times, but as the loads hung up I went and took a check and stopped the work.

Q: To whom did you report after you stopped the work?

A: To the ship boss and the chief mate of the ship.

Tr. p. 59, lines 21-23:

Q: What did you do then?

A: We stayed there and the chief mate got one of the crew with a sledge hammer to go down and

knock it in flush.

Tr. p. 62, lines 2-5:

Q: Did you in any way test it to see whether the flange was in any way loosened or weakened by reason of the pounding?

A: Well, as far as the metal and anything was concerned, it looked perfect. (Emphasis added.)

Tr. p. 62, lines 9-17:

Q: Did you check to see whether it was loosened by reason of the pounding?

A: It was welded, I didn't see no reason why, welded and bolted.

THE COURT: Well, wouldn't it be necessary to break that weld to pound the flange back flush against the trunk?

A: Well, at the time I had checked it and there was no weld broke, sir, whatsoever.

Tr. p. 65, lines 12-22:

Q: Did you look to see when you were down there on your inspection whether or not any crack had appeared as a result of the pounding?

A: I did not notice any.

Q: Did you check for it?

A: I did, sir.

Q: Then, how many pallet loads were dropped into the hold after the pounding had been completed and

before the accident in question?

A: I would say we worked about thirty minutes or five or six loads.

Tr. p. 66, lines 21-23:

A: No. We had worked from 10:45 to 11:15 before the accident and the loads came in very smooth. There was no loads hanging up.

ON CROSS EXAMINATION

Tr. p. 73, line 25 to Tr. p. 74, line 4:

Q: Now, after the men had worked on this, or the man with this sledge hammer and you looked at it then, at that time before the men started back to work did it appear to you to be safe?

A: Definitely, sir.

HARVEY L. CRUMBY Testified:

Tr. p. 80, lines 12-16:

Q: (By MR. LARSON) Did you observe after the flange was pounded back, did you go down and take a look at it at all?

A: No, I never went below deck. From where we were you can see it quite plainly, and the top portion of it was back in against the coaming.

Tr. p. 81, lines 15-19:

Q: And was the load or the bridle resting and putting any strain that you could observe on the flange?

A: No, not after it was pounded in. It puts

pressure on it naturally if it touches it, but it didn't hang up, I'll put it that way.

ON CROSS EXAMINATION

Tr. p. 83, lines 16-25:

Q: Now, after this repairing or the hammering of this by the crew did it appear to you to be safe?

A: Well, it was back in against the coaming, the same as it was when we began, yes.

THE COURT: You say it was back against the coaming the way it was when you first came in there, is that what you said?

A: When we began to work, yes, in the morning.

THE COURT: That was eight o'clock?

A: Yes.

Tr. p. 84, lines 1-11:

Q: (By MR. SIKES) Is it true that there were a number of loads after it was fixed before the load in which Mr. Noriega got hurt, there were a number of loads that had been taken in without any incident at all, is that right.

A: Oh, yes, five or six loads.

Q: I wanted to make sure what I heard. As I understand, on this particular load when Mr. Noriega was hurt, this load had not hung up as the previous loads had, but it was simply the rubbing and chafing of the gear, is that correct?

A: That is correct, yes.

3. COMPANIA's Theory.

Finding No. 3 is "clearly erroneous" within the meaning of F.R.C.P. 52 in so far as it implies an existing condition prior to the accident. Striking Finding No. 3 and turning to the gist of Supplemental Findings Nos. 5, 6, 8 and 11 and the supportive testimony quoted above, it is clear that:

a. Prior to the negligence which caused the injury no "antecedent condition"¹ existed since any condition which had existed (the bent flange) had been corrected. The injury was caused by the negligent acts of fellow longshoremen at the very moment of injury; and

b. This was "instantaneous unseaworthiness"² which this Court has declared does not result in liability of the ship.³

4. The Applicable Law.

NORIEGA's basis of recovery is the doctrine of unseaworthiness enunciated in Seas Shipping Co. v. Sieracki, 328 U.S. 85; 66 S.Ct. 872; 90 L.Ed. 1099 (1946). The Court below⁴

¹Beeler v. Alaska Aggregate Corp., 336 F. 2d 108 (9 Cir. 1964); Titus v. Santorini, 258 F. 2d 352 (9 Cir. 1958).

²Massa v. C. A. Venezuelan Navigacion, 209 F. Supp. 404 (E.D.N.Y. 1962); Blassingill v. Waterman S.S. Corp., 336 F. 2d 367 (9 Cir. 1964).

³Billeci v. U. S., 298 F. 2d 703 (9 Cir. 1962).

⁴Tr. p. 113, lines 2-6.

also relied on Blassingill v. Waterman S.S. Corp., 336 F. 2d 367 (9 Cir. 1964) which stated in dicta that unseaworthiness may result if the stevedoring company adopts an unsafe method of loading cargo (Tr. pp. 113, 114-115) and Crumady v. Joachim Hendrik Fisser, 358 U.S. 423, 3 L.Ed. 2d 413 (1959) which held an unseaworthy condition can be "brought into play" by the stevedore's negligence.

COMPANIA contends that neither Seas Shipping Co. v. Sieracki, 328 U.S. 85; 66 S.Ct. 872; 90 L.Ed. 1099 (1946); Blassingill v. Waterman S.S. Corp., 336 F. 2d 367 (9 Cir. 1964); nor Crumady v. Joachim Hendrik Fisser, 358 U.S. 423, 3 L.Ed. 2d 413 (1959) apply to this case but that this is a case of "instantaneous unseaworthiness" within the meaning of Beeler v. Alaska Aggregate Corp., 336 F. 2d 108 (9 Cir. 1964); Rawson v. Calmar S.S. Corp., 304 F. 2d 202 (9 Cir. 1962); Titus v. Santorini, 258 F. 2d 352 (9 Cir. 1958); Billeci v. U. S., 298 F. 2d 703 (9 Cir. 1962); Manhat v. U. S., 220 F. 2d 143 (2 Cir. 1954); Sullivan v. U. S., 203 F. Supp. 496 (S.D.N.Y. 1961); Ventre v. Oetker, 214 F. Supp. 659 (E.D.N.Y. 1963); Massa v. C. A. Venezuelan Navigacion, 209 F. Supp. 404 (E.D.N.Y. 1962) for which the vessel is not liable.

II

SPECIFICATION OF ERRORS

1

The court erred in that portion of Finding of Fact No. 3 which states:

". . . said metal flange . . . at the time
of the accident was protruding into the
working area. . ."

except in so far as the court was describing a condition which
existed at the moment of the accident.

2

The court erred in Findings of Fact Nos. 4 and 5,
Supplemental Finding of Fact No. 11, Conclusion of Law No.
2 and Supplemental Conclusions of Law Nos. 2 and 3 by fail-
ing to find and conclude that the unseaworthiness of the
SS "SAN LUCIANO" was instantaneous with plaintiff's injury.

3

The court erred in that portion of Conclusion of Law
No. 3 which states:

"Plaintiff is entitled to a decree against
the defendant Compania Naviera De Baja
California, S.A.,"

4

The court erred in ruling this case was controlled by

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L.Ed. 1099, (1946)
Blassingill v. Waterman S.S. Corp., 336 F. 2d 367 (9 Cir. 1964)
and/or Crumady v. Joachim Hendrik Fisser, 358 U.S. 423, 3 L.Ed.
2d 413 (1959).

III

ARGUMENT

1. Summary.

A. Finding that the flange protrusion was a precedent condition to the accident, is clearly erroneous and must be set aside.

B. There being no unsafe "antecedent condition", the injury was caused solely by the negligence of CRESCENT at the very moment of injury.

C. A vessel is not liable for negligence of the stevedore in the use of a seaworthy appliance at the very moment of injury.

D. The method of loading was not improper within the Blassingill Rule.

2. Discussion.

A. Finding that the flange protrusion was a precedent condition to the accident, is clearly erroneous and must be set aside.

F.R.C.P. 52(a) provides in part:

". . . findings of fact shall not be set aside unless clearly erroneous. . . ."

The judicial interpretation of "clearly erroneous"

is set forth in U. S. v. U. S. Gypsum Co., 333 U.S. 364, 395;
92 L.Ed. 746, 766 (1948) as follows:

"A finding is 'clearly erroneous' when although
there is evidence to support it, the reviewing court
on the entire evidence is left with the definite and
firm conviction that a mistake has been committed."

See also:

Barry v. Lawrence Warehouse Co., 190 F. 2d 433 (9 Cir.
1951);

Here, there is no evidence to support Finding No. 3.
It is inconsistent and directly contrary with Supplemental
Findings Nos. 5, 6 and 8. Obviously, "a mistake has been
committed". See the portions of the transcript quoted
above.

B. There being no unsafe "antecedent condition"
the injury was caused solely by the negligence of CRESCENT at
the very moment of injury.

Setting aside Finding No. 3 and turning to
Supplemental Finding No. 11 leads to the inevitable conclusion
that CRESCENT's negligence alone, at the very moment of injury,
was the sole cause of NORIEGA's injury.⁵

C. A vessel is not liable for negligence of the
stevedore in the use of a seaworthy appliance at the very

⁵ That the injury was not caused by an "improper method of
loading" is discussed in part D below.

moment of injury.

1. Herein of "instant unseaworthiness".⁶

The Ninth Circuit has recently enunciated the rule applicable hereto:

"Liability on the ground of unseaworthiness does not attach if the injury was sustained by the negligent use of a seaworthy appliance at the very moment of injury. It does attach if the negligent act has terminated and an appliance has been left in an unsafe condition."⁷ Beeler v. Alaska Aggregate Corp., 336 F. 2d 108 (9 Cir. 1964).

Other cases exemplary of the rule are as follows:

In Titus v. Santorini, 258 F. 2d 352 (9 Cir. 1958), Titus slipped and was injured when avoiding a loose load caused by a broken preventer wire and rope guy. The lower court found the vessel seaworthy. The Ninth Circuit, in affirming, discussed the several possible causes of the breaking of the

⁶A term used in Blassingill v. Waterman S.S. Corp., 336 F. 2d 367 (9 Cir. 1964) to describe Titus v. Santorini, 258 F. 2d 352 (9 Cir. 1958) and Billeci v. U. S., 298 F. 2d 703 (9 Cir. 1962).

⁷Cf. the language of Beeler, supra, "left in an unsafe condition" and "antecedent condition"; with Titus, supra, "a pre-existing condition".

1 preventer wire and rope guy. Among these the third category
2 was:

3 ". . . the possibility that the winch was improperly
4 operated or the loading was improperly done by a fellow
5 longshoreman at the instant when the breaking occurred.

6 . . .

7 [i]f the causation of the break was in this third
8 category, negligence at the moment of a fellow long-
9 shoreman, the ship would not be liable."

10 At page 354:

11 "This Court is not convinced that the instantaneous
12 acts of a fellow longshoreman rendering the equipment
13 unseaworthy and injury to the longshoreman are charge-
14 able to the ship as unseaworthiness."

15 The Ninth Circuit continued at page 355:

16 "It may be that the Supreme Court decisions will
17 reach the point where the shipowner is liable for un-
18 seaworthiness based on the very act of a fellow long-
19 shoreman which causes the injury, but it does not
20 appear that the Supreme Court has gone that far. It
21 would seem that unseaworthiness must be a pre-existing
22 condition."⁸ (Emphasis added.)

23 In a footnote, the court states:

24 "This concept is very clearly expressed by Circuit

25 ⁸See footnote 7.

Judge Learned Hand at page 922 of the Grillia decision."
Grillia v. U. S., 232 F. 2d 919 (2 Cir. 1956).

The statement of Judge Hand referred to is:

". . . when a strongback is dislodged by the negligence of a winchman, or of those who direct him, or when some one of the crew carelessly turns a lever that drops a boat from its davits, there is a moment, however, short during which the ship is unfit and during which her unfitness causes the injury; yet on such occasions she is not deemed unseaworthy." (Emphasis added.)

In Billeci v. U. S., 298 F. 2d 703 (9 Cir. 1962), Billeci was injured when a winch with safety pin not in place fell out of gear, causing the load to fall on his foot. The winch was seaworthy and the Ninth Circuit said at pages 705-706:

". . . the owner's warranty of seaworthiness does not extend to a negligent use by longshoreman of seaworthy appliances."

"This is not a case where the negligent act had terminated and an appliance was left in an unsafe condition." (Emphasis added.)

"Plaintiff's injury was sustained by the negligent use of a seaworthy appliance at the very moment of injury." (Emphasis added.)

See also:

Manhat v. U. S., 220 F. 2d 143 (2 Cir. 1954).

In Freitas v. Pacific-Atlantic S.S. Co., 218 F. 2d

562 (9 Cir. 1955), the Ninth Circuit affirmed the lower court's dismissal on the theory there was no evidence of unseaworthiness. The facts were summarized as follows, at page 563:

"A scow flat containing two handcars for use in a cargo removal had been lowered into the hold and had been pushed forward by the stevedores out of their way into the covered portion of the hold. The injury occurred after appellant and his work partner had attached four cables to the scow, which with the handcars aboard was to be lifted from the lower 'tween deck through the two partially uncovered hatches to the main deck. Because the scow flat was under the portion of the shelter deck hatch which had not been uncovered, the winch pulled it up at an angle; and as a result the shackle connecting the four cables to the hook caught against the lower side of the middle strongback of the shelter deck hatch. The winch operator failed to perceive the hooked condition until the strongback had been pulled from its supporting slots. The strongback and the hatch boards which it had been supporting fell to the lower 'tween deck, and one of the hatch boards struck appellant in the back."

In Freitas, the load, while being raised, caught under the strongback dislodging it. Here, the load, while being lowered, caught a strongback flange, dislodging it. COMPANIA places heavy reliance on Freitas. The observation

1 pertinent in Freitas is relevant here:

2 "[T]he accident in this instance was directly
3 brought about by an improper, if not foolhardy, use
4 of the ship's gear. . . . There was no showing that
5 if a locked strongback [in NORIEGA's case, a flange]
6 is in a seaworthy condition it can not be dislodged
7 by the force improperly and unnecessarily applied to
8 it here. Nor, conversely, was there evidence that the
9 winches were incapable of generating sufficient pressure
10 to dislodge a locked strongback in a seaworthy condi-
11 tion." Freitas v. Pacific- Atlantic S.S. Co., 218 F.
12 2d 562, at 564 (9 Cir. 1955).

13 The lower court's error in the instant case is
14 best revealed in the following verbal exchange:

15 MR. LARSON:

16 ". . . it was the flange which broke off in
17 the course of the cargo loading and struck the
18 plaintiff."

19 THE COURT: "Well, I think that establishes a
20 prima facie case." (Tr. p. 3.)

21 To the contrary, the above cases indicate that a
22 pre-existing unsafe condition must be proven. Here, the
23 flange was in perfect condition prior to the injury. Hence,
24 the vessel was not unseaworthy.

25 D. The method of loading was not improper within the

1 Blassingill Rule.

2 THE RULE OF BLASSINGILL

3 Although the findings below are silent as to whether
4 or not CRESCENT chose to employ a dangerous method of loading,
5 the trial judge in his remarks from the bench after the trial
6 stated:

7 ". . . it is the Court's opinion that . . . [the
8 stevedore] chose to employ a dangerous method within
9 the meaning of Blassingill" ⁹ (Tr. p. 113, lines
0 2-6).

1 In Blassingill, supra, at page 369 the Ninth Circuit
2 attributed the Supreme Court with having recognized in a
3 dictum ¹⁰ that unseaworthiness can result from an improper
4 method of loading.

5 Blassingill also notes that the Supreme Court's dictum "is
6 fully supported by the decisions of the lower federal courts..."
7 336 F. 2d 367, 369. Before reviewing Blassingill COMPANIA

8 ⁹The trial court also cited Crumady v. Joachim Hendrik Fisser,
9 358 U.S. 423, 3 L.Ed. 2d 413 (1959) which this court has des-
0 cribed as "not one of defective equipment but of an improper
1 method of using it." Blassingill v. Waterman S.S. Corp.,
2 336 F. 2d 367, 370 (9 Cir. 1964).

3 ¹⁰Morales v. Galveston, 370 U.S. 165, 170, 8 L.Ed. 2d 412, 416
4 (1962): ". . . a vessel's unseaworthiness might arise from
5 any number of individualized circumstances. . . . Her method
6 of loading her cargo . . . might be improper. . . ."

stresses that the trial court, having cited Blassingill, supra, and Crumady, supra, fortifies COMPANIA's contention heretofore made that the flange was not defective since neither are "defective equipment cases".

The pivotal question in this case is whether the activity of CRESCENT which caused NORIEGA's injury was negligence with respect to the particular load,¹¹ or whether the injury was caused by an "unsafe method of loading". An alternative description of the latter liability producing category is whether ". . . there was adopted by . . . CRESCENT a course of conduct that made the ship dangerous". Blassingill v. Waterman S.S. Corp., 336 F. 2d 367, 370 (9 Cir. 1964).

The trial court in Blassingill had refused to submit instructions to the jury to the effect the vessel is unseaworthy if the jury found the stevedore had adopted an unsafe method of unloading cargo.¹² The refusal to give the instruction was error under the rule announced in Wong v. Swier,

¹¹The court in Blassingill, supra, observed that ". . . Blassingill might fail in this case if the only danger was brought about by himself or his fellow longshoremen in not properly placing bales in the particular sling load that injured him" (p. 370). (Emphasis added.)

¹²In Blassingill, supra, the alleged unsafe method was placing four bales of cotton in each load, making each load dangerous.

267 F. 2d 749, 761 (9 Cir. 1959) that a party "is entitled to have his theory of the case presented to the jury by proper instructions if there is any evidence to support it." The case was, therefore, reversed and remanded for a new trial on the unseaworthiness count. The jury on the retrial in Blassingill was faced with the same question as the Ninth Circuit is faced with here, viz, whether this is a case of negligence with respect to a particular load or whether an "unsafe method" or dangerous "course of conduct" is involved. The findings of the court below put this case into the first category. COMPANIA agrees with the findings and contends that Blassingill does not apply.

First of all, Blassingill uses the words "method" and "course of conduct". These words imply a series of actions, repeated over and over. In Blassingill the stevedore had been putting four bales of cotton in each sling and the court stated only a two bale load was safe. In the NORIEGA case the only unsafe load was the one injuring NORIEGA wherein the bridle was allowed to chafe or catch on the hatch coaming flange. That particular load was handled negligently. The method was safe so long as executed carefully. The method entailed lowering the loads so as not to allow the bridle gear to chafe. For that reason Blassingill does not apply.

IV

CONCLUSION

On conclusion COMPANIA submits that the judgment in

1 favor of the plaintiff should be reversed.
2

3 Dated: September 9, 1965.
4

5 OVERTON, LYMAN & PRINCE
6 DAN BRENNAN
7 JEROME O. HUGHEY

8 By 
9 Dan Brennan

10 Attorneys for COMPANIA NAVIERA
11 DE BAJA CALIFORNIA, S.A.
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APPENDIX

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Defendants' C	24	45
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Defendants' H	38	45

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in dark ink, appearing to read "Dan Brennan", is written over a horizontal line.

Dan Brennan

No. 20192

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEROME L. DOFF, *et al.*,

Appellants,

vs.

BRUNSWICK CORPORATION,

Appellee.

Appeal From the United States District Court for the
Southern District of California Central Division.

BRIEF FOR APPELLANTS.

JEROME L. DOFF,

CLERK

121 South Beverly Drive,
Beverly Hills, California,

In Propria Persona for Appellants.

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No. 20192

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEROME L. DOFF, *et al.*,

Appellants,

vs.

BRUNSWICK CORPORATION,

Appellee.

BRIEF FOR APPELLANT.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a summary judgment of the United States District Court for the Southern District of California, Central Division, adjudging that appellee have and recover from appellants the sum of \$469,-665.35, together with interest thereon at the rate of 7% as provided by law and appellee's costs of suit incurred herein; and, further, that appellants take nothing by reason of their counterclaim on file herein and that said counterclaim be dismissed on the merits. Jurisdiction of the District Court was based upon diversity of citizenship and an amount in controversy which exceeds, exclusive of interest and costs, the sum of \$10,-000.00.

This Court has jurisdiction to entertain this appeal and to review the summary judgment of the District Court under Section 1291 of Title 28, United States Code.

II.

STATEMENT OF FACTS.

This is an action based in contract upon a Purchase Agreement and a Loan Agreement by and between appellee, Brunswick Corporation (Brunswick and Transa Structures, Inc. (Transa), both Delaware corporations, and a Guarantee Agreement executed by appellants for the purpose of guaranteeing loans made to Transa under said Loan Agreement.

Suit was filed herein by Brunswick on December 20, 1963 naming appellants Jerome L. Doff and Mildred C. Doff as defendants therein. The basis of said suit was the alleged failure of Transa to make repayment of loans arranged by Brunswick under said Loan Agreement and the failure of appellants to fulfill their alleged obligations under said Guarantee Agreement. [Transcript of Record, p. 2.]

Answer was filed by appellants on February 25, 1964 [T. R. p. 41] and, upon motion [T. R. p. 106] appellants filed an Amended and Supplemental Answer and Counterclaim on July 21, 1964. [T. R. p. 230.] The basis of said counterclaims was that Brunswick's failure to fulfill its obligations under said Loan Agreement was a breach of said agreement causing the insolvency of Transa and Transa's resulting inability to repay said loans; that said breach obviated appellant's obligations under said Guarantee Agreement; and that Brunswick's failure to purchase appellants' shares of stock in Transa pursuant to the terms and conditions of said Purchase Agreement constituted a breach of said agreement causing damage to appellants in the sum of \$1,000,000.00.

Appellee's Motion for Summary Judgment was filed on July 20, 1964. [T. R. p. 109.] Said motion was heard on August 3, 1964 and on August 10, 1964, and summary judgment in favor of appellee, based upon the Court's Findings of Fact and Conclusions of Law [T. R. p. 330], was filed and entered on August 21, 1964. [T. R. p. 336.]

Argument upon the motion for summary judgment was based upon appellee's assertion that there was no genuine issue of fact to be determined by the Court, in that appellee's allegations of default by Transa of the terms and conditions of said Loan Agreement were not controverted by appellants and that said alleged default automatically made appellants liable under said Guarantee Agreement, thereby providing ground for summary relief.

In reply, appellants asserted that said alleged default was, in fact, clearly and sufficiently controverted by appellants, both by the pleadings and by affidavit, and that, therefore, there was a genuine and substantial issue of fact presented with regard to the allegation of default and, further, that there were equally substantial and genuine issues of fact presented by pleading and affidavit with respect to other matters having to do with the entire said transaction between Brunswick and Transa, as said transaction related to appellants. [Supplemental T. R.]

The District Court ruled in favor of appellee's assertions as to lack of controversy on the allegation of default by Transa, dismissed appellant's counterclaim on the basis that said counterclaim was without merit in view of the Court's finding of default, and granted summary judgment in favor of appellee.

This appeal followed. [T. R. p. 359.]

III.

SPECIFICATION OF ERRORS.

A. The District Court erred in granting summary judgment herein in that:

1. A genuine and substantial issue of material fact was raised by appellants' pleadings as to whether or not Transa was in default of its obligations under the Loan Agreement at the time demand was made upon appellee by Transa to perform in accordance with the terms and conditions of said agreement.

2. A genuine and substantial issue of material fact was raised by appellants' affidavit in opposition to motion for summary judgment as to whether or not Transa was in default of its obligations under the Loan Agreement by reason of Transa's alleged failure to make an interest payment pursuant to the terms and conditions of said agreement.

3. A genuine and substantial issue of material fact was raised by appellants' affidavit in opposition to motion for summary judgment as to whether or not Transa was in default of its obligations under the Loan Agreement by reason of Transa's alleged failure to comply with the specific provisions of paragraph 5.2 of said agreement.

IV.

SUMMARY OF ARGUMENT.

Rule 56 of the Federal Rules of Civil Procedure, generally, permits the parties making and opposing a motion for summary judgment to file supporting affidavits, which together with the pleadings, depositions and admissions on file, may be examined by the Court to ascertain whether there is any conflict of factual matters.

Recognizing, however, the serious implications of providing summary relief without a trial on the merits, the courts have consistently held that a summary judgment cannot be granted if there is a conflict of factual matters, and that while affidavits may be submitted and scrutinized by the court to ascertain whether such a conflict of facts exists, such affidavits may not be used to determine the actuality of facts. *Transcontinental Gas Pipe Line Corp. v. Bourrough of Milltown*, 93 F. Supp. 283; *Zig Zag Spring Co. v. Comfort Spring Corp.*, 89 F. Supp. 410; *Rosenblum v. Dingfelder*, 111 F. 2d 406; *Lewis v. Atlas Corp.*, 63 F. Supp. 217, aff'd 158 F. 2d 599.

In further recognition of the aforementioned serious implications, the courts have been careful to resolve any doubt as to the existence of a genuine issue as to a material fact against the party moving for summary judgment. *Sarnoff v. Ciaglia*, 165 F. 2d 167; *Silvary Lighting v. Versen*, 10 F.R.D. 507; *First National Bank of*

Jersey City v. Fleming, 10 F.R.D. 159; *Burt v. Bilofsky*, 9 F.R.D. 299; *Robinson v. Waterman S.S. Co.*, 8 F.R.D. 155; *Newark Evening News Pub. Co. v. King Features Syndicate*, 7 F.R.D. 645.

The District Court in rendering summary relief herein relied exclusively upon affidavits submitted by the parties hereto, and failed to consider the pleadings on file. This is clearly contrary to the position consistently adhered to by the courts in holding that well-pleaded facts in the pleadings suffice of themselves, regardless of affidavits, to create a fact issue requiring denial of motion for summary judgment. *United Lacquer Mfg. Co. v. Maas & Waldstein Co.*, 111 F. Supp. 139; *Schenley Distributors v. Arsconsin Wine and Spirit Import Corp.*, 28 F. Supp. 635; 28 U.S.C.A. §§ 1338, 2201, 2202; 35 U.S.C.A. § 1 *et seq.*, 184.

Summary judgment in this matter was entered upon the District Court's findings of fact that Transa was uncontrovertedly in default under the terms and conditions of the Loan Agreement between Transa and appellee and that, therefore, there was no necessity for any further performance on the part of appellee.

Appellants, by way of their pleadings, affirmatively allege that Transa had performed all covenants, promises and conditions required under said Loan Agreement to be performed by Transa. Said allegation is, in and of itself, sufficient to negate and deny that Transa was in default when demand was made upon appellee to

fulfill its obligations under the Loan Agreement. The District Court, however, intent in its search for language of direct denial in appellant's affidavit, wholly failed to consider the obvious denial set forth in the pleadings of appellants.

In addition, the District Court, even in its restricted examination of appellant's affidavit, assiduously and miraculously avoided recognition of obvious statements of fact which could serve only to lead a reasonable mind to conclude that Transa's alleged defaults had, in fact, been denied by appellants and that, therefore, a genuine and substantial issue of fact had been raised.

Appellants assert that the District Court was in gross error in ruling that appellants had not adequately controverted appellee's allegations of default on the part of Transa. Not only are there adequate defenses to and denial of all of the allegations raised in appellee's complaint, but appellants, if permitted a full trial on the merits, feel confident that judgment will issue in their favor for the damages alleged in their counterclaims.

V.

ARGUMENT.

The District Court Erred in Granting
Summary Judgment Herein:

- A. Appellant's Pleadings Affirmatively Joins the Issue of Fact as to Whether or Not Transa Was in Default at the Time Demand Was Made Upon Appellee to Perform in Accordance With the Terms and Conditions of the Loan Agreement Between Transa and Appellee.

The basic elements of this action are of the utmost simplicity: money was lent which was not repaid and this action is brought for recovery thereof. However, the circumstances surrounding this simple premise of the within action are of the utmost complexity, and while there is no conflict with respect to the basic premise, the record reflects considerable conflict with respect to factual matters.

The volume of the pleadings and supporting affidavits on record in this matter provides ample demonstration of the true complexity of the issues involved, to which the District Court attested in its remark “. . . this is more voluminous than a trial, a motion for summary judgment. I would have been better off to have tried the case, I think . . .” [T. R. p. 34.] Appellant is in complete accord with the Court's observation.

Examination of the Transcript of Proceedings in this matter will show that the District Court based its ruling in favor of summary judgment entirely upon the Court's conclusion that Transa was in fact in default under the Loan Agreement as alleged by appellee. In reaching this conclusion, the Court relied entirely upon its interpretation of the meaning of the affidavits of

the parties, and stated, "I think in view of the default, there is no obligation on the part of Brunswick to supply any more money. And since there is no denial of that in the record I am afraid I will have to grant the motion for summary judgment." [T. R. p. 41.]

Contrary to the contention that the record reflects no denial of appellee's allegation of Transa's default, it will be seen that ample denial of this allegation was presented by appellants, both by way of the pleadings and by way of affidavit. Page 3 of appellants' Amended and Supplemental Answer and Counterclaim contains the following two paragraphs:

"II

On or about March 21, 1962, at Los Angeles, California, plaintiff entered into a written agreement with defendant JEROME L. DOFF and TRANSA STRUCTURES, INC., a corporation, (hereinafter referred to as TRANSA) wherein plaintiff agreed to loan, or cause another lender to loan, to TRANSA up to \$600,000. A copy of said agreement is attached hereto marked Exhibit 1, and made a part hereof by reference.

III

TRANSA performed all conditions, covenants and promises under said agreement on their part to be performed."

It is urged by appellants that no other meaning can be derived from the language of the aforequoted two paragraphs other than that Transa had performed all of its obligations under said agreement, that Transa was therefore not in default under said agreement, and

that the absolute effect of the language is a denial of any default whatsoever by Transa under said Loan Agreement.

B. Appellant's Affidavit in Opposition to Motion for Summary Judgment Contains Adequate and Sufficient Denial of Appellee's Allegation That Transa Was in Default Under the Loan Agreement by Reason of Transa's Failure to Make an Interest Payment on May 23, 1962.

Paragraph 10, page 4 of the District Court's Findings of Fact and Conclusions of Law reads as follows:

"Interest due and payable May 23, 1962, on said loan was not paid and constituted a default by Transa under notes evidencing said loans made to Transa to that date."

This "fact" was specifically controverted in the affidavit of appellant Jerome L. Doff in opposition to motion for summary judgment. On page 1 of said affidavit, lines 28 through 32, and on page 2, line 1, the following is stated:

"During the month of May 1962, Transa Structures made repeated demands upon Brunswick for the balance of \$130,000 *which Brunswick was obligated to loan to Transa under the Loan Agreement*; Transa even went so far as to forward a promissory note for the \$130,000 to Brunswick, but Brunswick refused to loan any additional sums to Transa."

On pages 4 and 5 of said affidavit, lines 30 through 32 and 1 through 2, respectively, the following statement is made:

"I know of my own knowledge that Transa's demand on Brunswick for the balance of \$130,000

was made prior to May 23, 1962, which is the date Mr. Niemann contends that Transa became in default on an interest payment and that Brunswick was excused *thereafter* from making any further loans.”

How could appellee reasonably assert, and the District Court concur, that appellee had a right to avoid performance under the Loan Agreement On the Basis of a Default Which Had Not Occurred at the Time Brunswick’s Performance Was Demanded?

It is submitted that the District Court, anxious in its search for a specific denial of the alleged default in interest payment, overlooked completely the fact that the language of the afore-quoted paragraphs, though couched in positive rather than negative words, is an unmistakable denial of default, inasmuch as no default existed prior to and at the time of the demand for additional funds which appellee was obligated to furnish under the Loan Agreement. Consequently, appellee had no right to avoid performance under said agreement and appellee’s allegation that Transa was in default at a later date is specious.

C. Appellant’s Affidavit in Opposition to Motion for Summary Judgment Contains Adequate and Sufficient Denial of Appellee’s Allegation That Transa Was in Default Under the Loan Agreement by Reason of Transa’s Failure to Comply With the Provisions of Paragraph 5.2 of Said Agreement.

Paragraph 9, page 3 of the District Court’s Findings of Fact reads as follows:

“On May 15, 1962 the number of said units sold and assigned to Brunswick by Transa under said

California contracts aggregated less than nine units and did not include assignments by Salestran, Inc. of its interests in said California contracts and constituted a default by Transa under said loan agreement.”

Paragraph 5.2 of said Loan Agreement reads as follows:

“Transa shall have assigned or caused to be assigned to Brunswick, or to the other lender hereunder, and shall have obtained the consents of all necessary third parties to such assignments, all sums due and to become due to Transa in connection with the Interior Contract and all sums due and to become due to Transa and to Salestran, Incorporated in connection with the California Contracts (which shall include at least thirty (30) units), such assignments and consents to be in a form acceptable to Brunswick’s General Counsel, and, where deemed necessary by Brunswick, all filings shall have been duly made and all notices duly given with respect to such assignments; provided, however, that, except as hereinafter provided, all of the foregoing contracts need not be assigned, prior to requesting any loan, if the amount of the requested loan, together with all the outstanding loans hereunder, does not exceed the moneys due and to become due under such of the foregoing contracts as have been assigned as aforesaid, with all necessary consents obtained and filings and notices duly provided for. In any event all of the foregoing contracts shall be assigned to Brunswick or such other lender prior to May 15, 1962, as security for all loans hereunder.”

Appellant Jerome L. Doff's affidavit in opposition to motion for summary judgment specifically controverts and denies this alleged default. On page 3, lines 17 through 22 of said affidavit, it is alleged:

"Also, a further reading of paragraph 5.2 of the Loan Agreement clearly indicates that there is no obligation on Transa to assign all of the contracts to Brunswick prior to May 15, 1962, if the total amount of the contracts that had already been assigned exceeded the amount of the loans."

At another point in said affidavit, it was stated:

"Mr. Nieman's interpretation of paragraph 5.2 of the Loan Agreement as set forth on page 4, line 3, of his affidavit is incorrect. That section only provides that all of the Transa contracts need not be assigned to Brunswick if, in fact, the contracts that had already been assigned exceed the amount of monies loaned. His further contention that Brunswick had an excuse for not loaning the full \$600,000.00 by reason of certain offsets claimed by Salestran is not meritorious for the reason that there is nothing in the loan agreement that reduces Brunswick's obligation to loan by any claim or offsets that Salestran or anyone else might have against Transa."

The aforequoted paragraphs are demonstrative of appellants' assertion that the District Court failed to recognize the exception contained in said paragraph 5.2 which made it unnecessary to assign any specific number of units or sums due under the California and Interior contracts if the value of the units and sums due under said contracts already assigned was of a value in

excess of the amount of the requested loan. Consequently while it may have been correct to allege that a number of units less than thirty had been assigned and that the interest in the California contracts had not been assigned, it was totally incorrect to conclude that a default had occurred without determining if the value of the units and contracts already assigned had a value in excess of the amount of the loan requested.

As stated *supra* herein, Transa made repeated demands upon appellee for the balance of \$130,000.00 which appellee was obligated to loan under said Loan Agreement. These demands were made during the month of May, 1962. At no point in the record does appellee deny that these demands were made and refused, or that said demands were not made prior to May 15, 1962. Implicit in the words "Brunswick was obligated" is a denial of any default on the part of Transa, whether such default might relate to the provisions of said paragraph 5.2 or any other default which might be alleged.

Examination of the Transcript of Proceedings, pages 38 and 39, lines 25, and 1 and 2, respectively, show complete reliance by appellee on the allegations set forth in paragraph 7(a) of William L. Niemann's Affidavit in Support of Summary Judgment, dated July 27, 1964. Said paragraph 7(a) states that:

"Section 5.2 of said loan agreement required the proceeds of the sale of at least thirty units of the California Contracts to be assigned to the lender prior to May 15, 1962, but the number sold and assigned prior to May 15 aggregated less than nine units and did not include assignments by Salestran, Incorporated, of its interest in the contracts as required by said section."

As is apparent from the foregoing, appellee merely alleged that the first portion of said section 5.2 had not been complied with, but failed to allege that the qualifying exceptions contained in said paragraph had not been complied with. The afore-quoted portions of appellant, Jerome L. Doff's affidavit clearly allege that the said paragraph 5.2 must be considered in its entirety and, when so considered, the allegations of Niemann are "incorrect" and "not meritorious," as alleged in the afore-said appellant's affidavit.

In brief, it was possible for appellant to specifically deny that portion of the said paragraph relied upon by appellee, but it was not necessary to so do as the balance of the paragraph not mentioned by appellee qualified the portion alleged. As a consequence, the District Court could presume that it was deemed admitted by appellee that the value of the units and contracts assigned exceeded the value of the amount of loan requested.

Finally, Jerome L. Doff's aforesaid affidavit states unequivocally that:

"It was my understanding that all of the contracts which were to be assigned to Brunswick under the Loan Agreement had either been assigned to Brunswick or were held by Brunswick in a condition for assignment and recording. . . ." [p. 3, lines 13-16 of said affidavit.]

Appellant asserts that the above quoted language is a specific denial of appellee's allegations of default by Transa under said paragraph 5.2 of said Loan Agreement. The District Court was not receptive to this assertion as demonstrated by the following exchange between counsel for appellant and the Court [T. R. p. 35, lines 21-25; p. 36, lines 1-6]:

“The Court: Well, let’s take the one that is more direct, there is one of the two that is more direct. The first one is that the 30 units to be assigned had not been, and there were less than nine. How about that?”

Mr. Lane: All right. Mr. Doff’s affidavit, he says, your honor, that as far as he knew they were assigned. That was his understanding—

The Court: Well, that is not a denial, counsel, that doesn’t meet the issue.

You know in a motion for summary judgment the rule requires that you must make a positive, specific statement.”

While the Court did not appear to think that the words “It was my understanding,” as stated by Jerome L. Doff in his affidavit and quoted above, were sufficient to afford evidence of a positive and specific state of mind, it will be noted in the following exchange between the Court and counsel for the appellee, which took place immediately prior to the above quoted exchange, that the Court, itself, used the word “understanding” as an indication of a positive and specific state of mind:

“The Court: In your affidavit do you allege anywhere that this is the reason you did not make the additional loan?”

Mr. Workman: That is correct, your Honor.

The Court: It is my understanding that you have. I have read them all over. . . .”

Appellant urges that the foregoing statement by appellant Doff that his understanding was that all the requirements of paragraph 5.2 had been satisfied constitutes a specific denial which, in addition to the other denials asserted above, gives rise to a genuine and substantial issue of fact requiring a trial on the merits.

VI.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the District Court's order granting summary judgment in favor of appellee be reversed, and the cause remanded with instructions that the action be tried on the merits.

JEROME L. DOFF,
In Propria Persona for Appellants.

Certificate.

I certify, that in connection with the preparation of this Amicus Curiae Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

JEROME L. DOFF

No. 20,191

United States Court of Appeals
For the Ninth Circuit

JAMES BAUER TOLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of Guam
for the unincorporated territory of Guam

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE

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FILED

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WILLIAM E. WILSON, Clerk

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No. 20,191

**United States Court of Appeals
For the Ninth Circuit**

JAMES BAUER TOLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the District Court of Guam
for the unincorporated territory of Guam**

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE

JURISDICTION

The jurisdiction of the District Court of Guam of crimes occurring within the special maritime and territorial jurisdiction of the United States is pursuant to Section 1424(a), United States Code, and Section 7(3), Title 18, United States Code.

The jurisdiction of this Court is predicated upon Section 1291 and 1294, Title 28, United States Code and Section 1424(b), Title 48, United States Code.

STATUTES AND RULES INVOLVED

The Statutes and Rules involved are set out in the Appendix.

STATEMENT

This is an appeal from a conviction of guilty for the crime of Grand Theft resulting from a verdict of a jury.

The defendant, under the provisions of Title 18, Section 13, United States Code, was charged by Information for violating Section 484 and Section 487, Penal Code of Guam, pursuant to Title 18, Section 13, United States Code. The crime occurred on lands within the special maritime and territorial jurisdiction of the United States as defined by Title 18, Section 7, United States Code.

An Information was filed on January 19, 1965, in the District Court of Guam charging the Appellant and two others with the commission of the crime of Burglary and Grand Theft under Title 18, Section 13, United States Code (459, 484, 487, Penal Code of Guam). The joinder of offenses and defendants was pursuant to Rule 8, Federal Rules of Criminal Procedure. The Appellant, on February 12, 1965, filed a Motion for Severance of his trial from that of his co-defendants and to make the Information more definite and certain. The Motion, after a hearing before the Court on February 19, 1965, was denied.

The trial was then started on March 1, 1965, and during the course thereof, as a result of a question involving moral turpitude of a witness appearing for one of the other defendants, the Court instructed the jury to disregard the said question and answer for the reason that an attempt to impeach the witness was predicated upon a conviction of a lesser offense than

a felony. Subsequently, the Court dismissed the charge against that defendant in order to remove any taint of prejudice from the conduct of the trial. The jury retired to consider its verdict after the presentation of evidence. There is no record of the time the jury deliberated, but it was after approximately twelve hours that, upon inquiry by the Court, it reported, through its foreman, that it had arrived at a verdict as to Count I, but was unable to agree as to Count II. The Court thereupon requested the jury to retire and to prepare its verdict as to Count I. The jury returned a verdict of not guilty to the charge of Burglary. Upon further questioning, the jury reported, through its foreman, that it was hopelessly deadlocked and would be unable to agree upon a verdict as to Count II by further deliberation. The Court, thereupon, discharged the jury and declared a mistrial.

The retrial as to Count II (Grand Theft) was to jury. Efforts to select a jury began April 1, 1965. A jury panel was exhausted before a complete petit jury of twelve persons was selected. The Court continued the case for one week during which time additional talesmen were selected from which a complete jury was selected and the trial commenced on April 12, 1965. The jury found the defendant guilty. This appeal followed.

SUMMARY OF ARGUMENT

The offenses of Burglary and Grand Theft are separate and distinct, although they may, as in this case they did, arise from the same series of criminal acts. An acquittal as to one of the offenses does not

operate to create a bar to retrial of the other offense under principles of double jeopardy or *res judicata* where the original trial terminated without a verdict as to such offense by reason of the inability of the jury to agree.

Double jeopardy operates to bar a second trial where the offenses charged are identical or included, but not from the fact that separate charges arise from one wrongful act or that the evidence to prove both offenses is substantially the same. In the instant case, the elements of the separate offenses were present, although arising out of a single series of transactions, and were sufficient to establish the commission of each crime independently. Therefore, double jeopardy did not exist at the second trial.

Res judicata will not lie to bar a second trial where retrial is not on an issue necessarily determined in the first trial, as is often the case where the charges are for example, (1) to commit a crime and (2) to engage in a conspiracy to commit the crime. The circumstance of the present case is that two substantive charges were involved and independent evidence exists to establish the elements of each distinct crime. Acquittal as to one, therefore, does not merge into it the elements of the separate crime and Appellant may be retried as to the unresolved issue.

Review of the procedural aspects of the trial show that Appellant was not prejudiced in the conduct of his defense. The complaints of the Appellant as to the failure of the Court to sever his first trial from those of his co-defendants, the discharge of the jury without

polling and without his consent when it was unable to agree as to a verdict as to Count II and permitting a group of unsworn prospective jurors to separate while additional talesmen were selected was not abuse of discretion on the part of the trial judge.

The response of the trial judge to a situation created by a seemingly improper question to the witness for another defendant was sufficient under the circumstances to protect Appellant and insure him a fair trial. In addition, such incident was not a factor in determining the fairness of the second trial, at which he was convicted.

The substantive questions must be resolved against the Appellant. And, in the absence of showing of a prejudicial influence attaching to the Appellant by reason of the exercise by the Court of its discretion, or that the response of the Court to prejudicial incident concerning another defendant was insufficient to protect the right of Appellant and insure him a fair trial his procedural complaints are without substance.

Therefore, the verdict should be affirmed.

ARGUMENT

I

TRIAL PROCEDURES AND CONDUCT OF ATTORNEY FOR PROSECUTION IN FIRST TRIAL AFFORDS INSUFFICIENT GROUNDS FOR REVERSAL.

Aside from the substantive issues involved, the Appellant places reliance upon procedural matters as grounds for the reversal of his conviction in the second trial. Briefly stated, these matters are:

1. The failure of the Court to sever Appellant's trial from that of the other defendants.
 2. The conduct of the prosecution in reference to the other defendant in the first trial which allegedly operated to the detriment of the Appellant.
 3. The discharge of the jury without the consent of the Appellant and without polling it as to its inability to agree as to a verdict on Count II of the Information.
 4. The Court permitting partial jury to separate while additional jurors were summoned.
1. **The failure of the Court to sever Appellant's trial from that of the other defendants.**

The rule governing the joining of defendants is Rule 8(b) of the Federal Rules of Criminal Procedure. In this case, the circumstance is that the defendants participated jointly in a criminal transaction. The acts of each were different, one defendant being charged as the perpetrator of the crime and the Appellant being charged as a principal by reason of having aided and abetted its commission. However, their joint efforts had a common purpose and goal. Rule 8(b) provides for charging defendants jointly where it is alleged that they have participated in the same acts or transaction constituting the offenses for which they are charged. In *Rakes v. United States*, 169 F.2d 739, (CA 4th, 1948), Cert. denied 335 U.S. 826, 69 S. Ct. 51 the circumstance of the passive defendant who aids and abets rather than engages

directly in the perpetration of the act is discussed. That case found that a person who aids and abets, in conjunction with others, in some series of related transactions, may be joined in the indictment or information with his fellow participants. See also *Rutherberg v. United States*, 245 U.S. 480, 38 S. Ct. 168 (1918).

Here, notwithstanding the fact that the Appellant did not take or carry away property of another, the criminal activity, the basis of the information, was common to both defendants to which each had contributed his efforts to achieve success. The evidence at the trial showed no separate act or acts performed by the Appellant that were not related to the unlawful acquisition of the property of another and its disposal. In this respect, the crime for which the Appellant was tried was the same as that for which the co-defendant was tried.

The Appellant, here, raises the issue outside the purview of Rule 8(b) when he asserts his contention that the defendants were improperly joined because he was unable to raise some unknown objections to the desire of the counsel of his co-defendant to admit into evidence a prior statement made by a Government witness (Appellant's Brief, pp. 25-26). Appellant asks this Court to speculate upon what objections could have been made by his counsel and to assume that, because such possible objections were not made, he was prejudiced before the jury. The transcript, assuming the introduction of the statement would have been improper, amply shows the ability of the trial judge

to protect the interest of the Appellant, negating any presumption of prejudice because counsel was unable to make pertinent objections for fear of injuring the case of the co-defendant.

2. The conduct of the prosecution in reference to another defendant which supposedly operated to the detriment of the Appellant.

It is conceded that acts of prior misconduct on the part of the witness for the defense, not resulting in a conviction, may not be delved into on cross-examination in an attempt to impeach. In this case, propounding a question to the alibi witness for the defendant Ward in the first trial as to her conviction for prostitution, considering the circumstances that the conviction had been reversed, (a fact unknown to the prosecution) may have been improper.

However, in light of the judge's action of admonishing the jury to disregard the question and answer and, subsequently, to eliminate any possibility of a continuing taint of prejudice, dismissing the charges as to the defendant Ward, it is submitted that Appellant has failed to show any prejudice as to him. In fact, considering the jury's verdict as to Count I and its disagreement as to Count II in the first trial, we must agree with Appellant's argument that the effect of the incident upon the results of the trial is speculative. It is all too apparent, in view of the evidence of guilt presented in the first trial, the same evidence which resulted in a verdict of guilty in the second trial, that the jury must have resolved such speculation in favor of the Appellant.

It is conceded by the Appellant, that mere speculation as to the attitude of the first trial jury ought not to be the criteria for reversal or affirmance of the result of the second trial. The question is whether the alleged improper question affected the Appellant in the second trial. The witness, Palen, was present in the first trial to dispute the credibility of the Government's witness, Wansor, by testifying that Ward was at her home at the time Wansor had said Ward was with him engaging in the criminal conduct for which he was on trial. The Appellant was unaffected by her answer since it did not relate to his conduct. The fact that the Appellant was not affected by the witness, Palen's, testimony is substantially revealed by the fact that if such testimony had been important to establish his guilt or innocence it is logical to assume that he would have had her testify at the second trial.

3. The discharge of the jury without the consent of the Appellant and without polling it as to its inability to agree as to a verdict on Count II of the Information.

In all three cases cited by the Appellant in support of his contention that the Court erred in failing to poll the jury as to its inability to agree and discharging the same without the consent of the defendant, the factual circumstances are at variance with those of the instant case. In addition, it should be added that each of the cases cited, discussing the circumstances that would permit the judge to exercise his discretion to discharge a jury without the consent of the defendant, the circumstance of the failure of the jury to agree on a verdict is included.

In *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221 (1957), which the Appellant feels ought to be controlling, the facts related to a first conviction of a lesser included offense and, when remanded, the defendant was placed on trial a second time for the greater offense. The conclusion of the Court related to double jeopardy, but, in discussing circumstances which would permit a retrial, the Court included the circumstance wherein the jury is unable to agree. The quotation from the case appearing in Appellant's Brief (p. 10) is sufficient to illustrate the point:

“ . . . At the same time *jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where unforeseeable circumstances . . . arise during (the first) trial making its completion impossible, such as the failure of a jury to agree on a verdict . . .*” (emphasis supplied)

Likewise, in *U.S. v. Tateo*, 216 F. Supp. 850, (N.Y. 1963), the facts are different, and the conclusion related to a question of double jeopardy in a circumstance where the trial was terminated prior to the time it was received by the jury. However, the Court specifically quotes with favor the general rule, as announced in *United States v. Perez*, 9 Wheat. 579, 6 L. Ed. 165 (1824), applicable to the circumstances under which a jury may be discharged without consent of the defendant.

In *Downum v. United States*, 300 F.2d 137 (CA 5th, 1962), the Court refers to *Gori v. United States*, 367 U.S. 364, 81 S. Ct. 1523 (1961), as stating the

“... sound reasons for the termination of the current trial proceedings which will invariably result in the discharge of one jury with the expectation that another one will be chosen at a subsequent proceeding.”

Such sound reasons, as set forth in the *Gori* case, *supra*, include the disagreement of the jury. There the Court said,

“... There are occasions when a second trial may be had, although the jury was discharged without reaching a verdict and without the defendant's consent. Mistrial because the jury was unable to agree is a classic example; and that was the critical circumstance in *U.S. v. Perez*, 9 Wheat. 579, 6 L.Ed. 165; *Logan v. U.S.*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429; *Dreyer v. People of State of Illinois*, 187 U.S. 71, 23 S.Ct. 28, 47 L.Ed. 79; *Moss v. Glenn*, 189 U.S. 506, 23 S.Ct. 851, 47 L. Ed. 921; *Keerl v. State of Montana*, 213 U.S. 135, 29 S.Ct. 469, 53 L.Ed. 734.”

4. The Court permitting the partial jury to separate while additional jurors were summoned.

In the second trial of the Appellant, the jury panel was exhausted before a complete jury of twelve persons was selected. The judge, after admonishing the selected prospective jurors not to discuss the case or to permit others to discuss it with them, allowed them to go to their respective homes. The prospective jurors were given instructions to return in one week. When the court reconvened as to this case, additional necessary jurors were selected, the entire jury was sworn and the trial proceeded.

The Appellant has advanced no unusual circumstances as to why, under the conditions that existed, the prospective jurors should not have been permitted to separate nor has he shown that they would have been exposed to any corruptive or prejudicial influence during the time they were separated through necessity.

In the absence of a showing of exceptional circumstances for the necessity of keeping the jury together, or that they would be subject to influences prejudicial to the Appellant, the question of whether the jury may be separated appears to be within the sound discretion of the court, employed with suitable safeguards.

In *Holt v. United States*, 281 U.S. 245, 31 S.Ct. 2 (1910), the Court denied that the mere opportunity for prejudice or corruption was sufficient to raise the presumption that they exist. Applying this rule, the Courts have consistently held that the matter of the separation of the jury is within the sound discretion of the trial judge. *Kleven v. U.S.*, 240 F.2d 270 (CA 8th, 1957); *McHenry v. U.S.*, 276 F. 761 (DC Cir., 1921); *Lucas v. U.S.*, 275 F. 405 (CA 8th, 1921), and *Brown v. U.S.*, 99 F.2d 131 (DC Cir., 1938), cert. denied 305 U.S. 562, 59 S.Ct. 97.

Thus, in *Coppedge v. U.S.*, 272 F.2d 504 (DC Cir., 1959), where the Court recessed from Thursday until Monday, the Court found favor in the rule cited in the *Brown* case, *supra*, (where the jury was permitted to separate overnight, on two occasions, and on a week-end)

“ . . . Under modern conditions, juries are permitted to separate, even over weekends, and unless

there be exceptional circumstances, they should be permitted to do so . . .”

subject to the following conditions:

“ . . . in all criminal cases whenever jurors are permitted to separate, the Court should invariably admonish them not to communicate with any person or allow any person to communicate with them on any subject connected with the trial, and not to read published accounts of the trial . . .”

A case most similar in circumstances to the instant case is *United States v. Cornett*, 142 F.Supp. 764 (Ky., 1956), affirmed 245 F.2d 118 (CA 6th, 1959), wherein the judge advised the unsworn jury it would not be sworn that night and permitted it to separate until the following morning.

Consequently, it is submitted that where there is an absence of compelling reasons for keeping the jury together, the jury has not been sworn, nor even completely chosen, and the Court has admonished the prospective jurors not to discuss the case or permit others to discuss it with them, the exercise by the Court of its discretion to permit the jurors to separate was proper and no inference of prejudice to the Appellant may attach in the absence of a showing thereof.

II

PRINCIPLES OF DOUBLE JEOPARDY DO NOT OPERATE TO BAR RETRIAL ON ISSUE OF GUILT OF A SEPARATE OFFENSE.

The subsequent trial upon Count II of the Information was not barred by principles of double jeopardy when the jury in the first trial had agreed on Count I and had been unable to agree on Count II, and the Court had thus declared a mistrial as to Count II.

As stated above, Appellant was charged with two counts: The first count for Burglary and the second count for Grand Theft arising from the same acts. Appellant contends that the Court lacked jurisdiction to try the charge of Grand Theft after the acquittal of the charge of Burglary.

Such a contention flies in the face of all the principles of double jeopardy. Certainly the mistrial itself does not create double jeopardy. This was considered by the United States Supreme Court in *Gori v. United States, supra*, a decision on a case in which Gori had been prosecuted for receiving and possessing stolen goods. During presentation of the Government's case, the Court declared a mistrial *sua sponte* without consent of the defendant who was retried and claimed double jeopardy at the second trial. The Court quoted with approval cases holding,

“The double jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment.”

The Court said,

“Where for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant’s consent and even over his objection and he may be retried consistently with the Fifth Amendment. *Simmons vs. United States*, 142 U.S. 148; *Logan vs. United States*, 44 U.S. 263.”

Even the dissent in the *Gori* case, while maintaining contrary to the majority that the Court in these particular circumstances should not have declared a mistrial, recognized inability of a jury to agree as a legitimate example of proper dismissal of a jury without jeopardy attaching. This is what we are considering here.

But Appellant seems to believe jeopardy attaches here merely because a verdict was received in the first trial on the first Count regardless of what happened to the second Count. We submit this would only be true if the counts were identical or included offenses or so identical as to estop the Government from determination of the second issue after a jury had decided the first. And this is what Appellant’s cited authorities hold.

Since the two charges, Burglary and Grand Theft, are separate and distinct offenses, it cannot be argued Appellant was tried twice for the same offense. Burglary requires (1) entry of a building with (2) intent

to commit a felony. Grand Theft requires (1) theft of property (2) of a value in excess of \$50.00.

The elements of the two crimes are obviously distinct and separate and one could be found guilty of the one offense and not guilty of the other, or guilty or not guilty of both offenses.

It is not disputed that the evidence was substantially the same in both trials. But this is not the issue in a claim of double jeopardy. The issue is whether the same evidence is *necessary* in both charges. As stated by the 2d Circuit Court in *United States v. Kramer*, 289 F.2d 909 (CA 2d, 1961), cited by Appellant,

“Offenses are not the same for purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct; they are the ‘same’ only when the evidence *required* to support a conviction upon one of them (the indictments) would have been sufficient to warrant a conviction upon the other.” (emphasis supplied).

As already noted, the evidence “required” for Burglary is entirely different from that “required” for Grand Theft. On the other hand, the same evidence may properly be used to prove many crimes.

Even in the case of *Sealfon v. United States*, 332 U.S. 575, 68 S.Ct. 237 (1948) the case most referred to in Appellant’s Brief in connection with this issue as well as *res judicata*, the Court was not disturbed by the possibility of double jeopardy in the two trials. In this connection, it should be noted that the criminal

offenses charged in the *Sealfon* case were conspiracy to commit an offense and commission of the offense itself. Nevertheless, the Court held these were separate and distinct offenses and thus a person may be prosecuted for both.

We have no quarrel with authorities cited by Appellant in his attempt to prove twice in jeopardy as a result of the second trial. Appellant cites cases which held either that once having been acquitted for an offense the defendant may not be retried for the same offense or, as in *Ex Parte Nielsen* (Appellant's Brief, page 18), argues that an acquittal or conviction bars prosecution for any offense included within the offense for which the defendant was convicted or acquitted. Neither situation exists here since Appellant was not retried for the offense of which he was acquitted nor is the offense of Grand Theft an included offense within Burglary.

Further authority for the proposition that disposition of separate offenses charged in the same indictment does not give rise to a plea of once in jeopardy upon disposition of one of them, is found in the recent case of *United States v. Goldman*, F.2d (CA 3d, 1965). In that case, the defendant during his trial on two counts of an indictment, pleaded guilty on one count. The trial then proceeded and the jury found him guilty of the other count. The counts charged different offenses arising from the commission of a single wrongful act. The Court held the defendant was not placed in double jeopardy by his plea of guilty to one count and subsequent conviction upon another.

A similar holding in a case more nearly analogous to the procedural situation here is found in *Cosgrove v. United States*, 224 F.2d 146 (CA 9th, 1954). There, defendant was charged with conspiring to avoid tax penalties and violating 18 U.S.C. 1001, and aiding and abetting the preparation of a fraudulent return. The “aiding and abetting” charge described a substantive offense under the tax laws, and not the status of defendant as a principal under Title 18, United States Code, Section 2. Cosgrove was acquitted of the former; the jury disagreed on the latter, for which he was retried. In discarding the plea of former jeopardy the court noted former jeopardy involves an “identity of offenses.” It then applied *res judicata*, the significance of which will be discussed hereafter. But the retrial was upheld as to the plea of former jeopardy.

III

THE RETRIAL UPON THE SECOND COUNT WAS NOT BARRED BY PRINCIPLES OF RES JUDICATA.

Throughout most of Appellant’s arguments in his Brief are references touching upon principles of *res judicata*. In any discussion of *res judicata*, primary reliance must be placed on *Sealfon v. United States*, *supra*, which is the most recent authority on the subject of *res judicata* in criminal cases. In the *Sealfon* case, the Court held, on the basis of a particular fact situation, that the earlier acquittal on a conspiracy count of one indictment precluded a subsequent conviction on a substantive count of another indictment.

It is apparent from this and other cases that a prior judgment of acquittal for one offense is not a bar to a trial for another offense, although it may create an estoppel as it did in the *Sealfon* case. Thus, the prior determination may be pleaded as the defense in the second trial. The *Sealfon* case must be distinguished from the instant case, however, because here, Appellant was charged with two separate substantive offenses in which proof of a single fact was not essential to both. The facts of the *Sealfon* case indicate, on the other hand, that the defendant could not have been guilty of one if he were innocent of the other.

Appellant eagerly emphasizes in his Brief that no issue of conspiracy is involved here. We certainly agree. For if the acquittal had been a conspiracy and the conviction of the substantive, the particular facts of this case might have brought us under the *Sealfon* doctrine. We also contend that the acquittal of Burglary is not determinative of the issue of Grand Theft, unless there had been no evidence of theft apart from the evidence of Burglary. For whether one issue is determinative of the other, as stated in the *Sealfon* case, "Depends upon the facts adduced at each trial and the instructions upon which the jury arrived at its decision of the first trial."

In the *Cosgrove* case, *supra*, res judicata was applied, the Court holding,

"... the issue of conspiracy and that of aiding and abetting are so nearly identical as to give rise to the defense of res judicata in favor of Cosgrove."

But the Court made clear the prior judgment (Acquittal of conspiracy)

“... is conclusive between the parties only as to matters actually litigated and *determined by the judgment.*” (Emphasis supplied)

The Court then analyzed the *Sealfon* case as preventing a conviction of aiding and abetting following an acquittal for conspiracy, because proof of the latter required proof of “... an agreement which at each trial was crucial to the prosecution’s case and which was necessarily adjudicated in the former case to be non-existent.”

In the instant case, on the other hand, it was never adjudicated at the first trial whether appellant had committed theft; the jury was unable to decide that issue. It was decided only that he had not committed burglary.

To the same effect is *Kramer v. United States*, discussed, *supra*. Defendant was tried under charges of four counts, including two of conspiracy to rob two post offices, one of conspiracy to receive stolen property and one of receiving stolen property. He had previously been acquitted of charges that he committed the robberies. The Court said,

“Application of the principle (of *res judicata*) has two phases. The first is to determine what the first judgment determined, a process in which, as the *Sealfon* case makes plain, the Court must look not simply to the pleadings but to the record in the prior trial. The second is to examine how that determination bears on the second case . . .”

“The issue was not whether ‘jobs’ had been done, but by whom.”

The Court then noted that the judge had charged the Jury that it was not necessary defendant personally did every act constituting the offense charged. It was enough, under the aiding and abetting statute, that he wilfully participated therein.

Similarly, that there was a theft in the instant case was not disputed. The issue was who was responsible. Evidence of the activities giving rise to the charges came from the testimony of John Michael Wansor, a Navy man who apparently turned to crime in his spare time. Pursuant to local law, Wansor was not tried with his co-actors, including Appellant, but by Court-Martial where he had been convicted prior to the trial of Appellant.

In his testimony (T.R. pp. 272 to 317), Wansor relates being at Appellant's home the night the offenses were committed. Present were Appellant and his co-defendants, Mantanona and Ward. Three trips were made to the warehouse area, thefts occurring each time. He tells of leaving Appellant at the house and proceeding in Appellant's truck to the site of the theft. A substantial amount of property, including large spools of copper and steel wire, from the warehouse yard outside the fence were loaded onto Appellant's truck and returned to his house where they were unloaded. There followed, a short time later, a second trip to the warehouse, again in Appellant's truck. On this occasion, the fence was cut, the truck driven in-

side, and spools of wire and other items taken from the yard were loaded on a truck belonging to the contractor. This truck, together with Appellant's, was driven back to Appellant's and unloaded. Wansor's testimony, then, is significant evidence of Appellant's knowledge, complicity and direction of the operation (T.R., p. 286, Lines 1 through 26; p. 287, Line 1):

“Q. . . . What did you do when you arrived at Mr. Tolan's house?

A. Unloaded the wire.

Q. If you know, was there any one there at Mr. Tolan's house when you arrived?

A. Mr. Tolan.

Q. What, if anything, did Mr. Tolan do when you arrived?

A. Mr. Tolan came out and saw the H & G truck and told us it was a stupid move to take the truck because you get into stolen, you know, stealing motor vehicles and that kind, and then he looked over the truck, took the tire off it, looked in the tool box and covered up the wire and told us to take the truck back.

Q. I see. Where was the wire located? You took it off the truck, is this correct?

A. Yes.

Q. Where did you put the wire?

A. Inside Mr. Tolan's house.

Q. And is it your testimony that Mr. Tolan covered up this wire?

A. Yes sir, he took the top out of the pickup.

Q. And is it your testimony that he took a tire off the H & G truck?

A. I am not positive Mr. Tolan took it off, I know he said something about taking it off but I don't know who took it off.

Q. What, if anything, did the defendant, Tolan, say at this time? Did you have any conversation with him at this time?

A. Well, he said that the truck, 'Take the truck back to H & G,' that is about the extent of the conversation."

Note how that testimony coincides with that of the company manager that wire had been taken from the yard (T.R., p. 246, Lines 19 through 26):

"A. . . . That was a reel that was missing.

Q. How many feet did that reel originally have?

A. I believe that was a full reel that had that many feet to begin with.

Q. That reel had 1585 feet of wire. Did you see that reel on Saturday yourself?

A. The reel had been in the yard. I didn't—I saw all the reels. I didn't particularly pick one out."

The third trip contains evidence of property stolen from the warehouse building itself. Once more, Wampler's testimony shows knowledge on the Appellant's part of what was taking place. Appellant's reaction to the entry of the building was negative, to be sure and this may have influenced the jury on the burglary charge, but his objection to what the other persons had done was one of form and not substance. Nowhere in the testimony can be found any objection by Appellant to the use of his vehicle and his premises in the commission of the thefts. On the contrary, his complicity is apparent throughout the evidence of that

night through the following days when Appellant proceeded to dispose of the property (T.R., p. 289, Line 26; p. 290, Lines 1 through 19):

“A. . . . Well, he looked over some stuff we had in the truck and then he said that it was a stupid move to break into the warehouse because that would give us a burglary on top of that, if they caught us for stealing.

Q. What did you do next?

A. I slept.

Q. How long did you sleep?

A. Not very long, maybe an hour, hour and a half.

Q. How was the truck unloaded that you brought back to Mr. Tolan's house?

A. Everybody just brought something and brought it in the house.

Q. Who was everybody?

A. Mr. Ward, Mr. Mantanona and myself.

Q. Did Mr. Tolan help you?

A. I don't believe so.

Q. Where did you put the things you unloaded from the, from Mr. Tolan's truck?

A. In Mr. Tolan's house, all except some wire we left upon the truck.”

(T.R., pp. 307, Lines 1 through 6):

“A. . . . Oh, it was in line with Mr. Tolan's objections about breaking into the warehouse and that he said, as I recall, something about it was a foolish move because it would be another charge in case anybody got caught, and then I believe he said he wasn't worried because all they could get him for was as a fence for the stolen property.”

The amount of wire taken which was cut up for sale at Appellant's instigation is described by Wansor on cross-examination (T.R., p. 312, Lines 21 through 24):

“Q. . . . How many rolls of wire was cut up?

A. I believe three.

Q. And all put in one drum?

A. Yes, sir.”

Appellant's participation in these acts is verified by witnesses Tenorio, Pangelinan, and Terlaje (T.R., pp. 317 through 350), and in fact, Appellant admitted to the sale of the stolen transit and that he endorsed the check received as payment to the Agent of Naval Intelligence, Mr. Tannehill (T.R., pp. 352, Lines 23 through 26; p. 353, Lines 1 through 4):

“A. . . . I asked him if a transaction occurred in his home involving the sale of a surveyor's transit and he answered that ‘Since you already know that you have uncovered two witnesses, that there would be no point in my denying it.’ I showed him his signature upon the back of this check and asked him if that was his signature . . . He said it was.”

The evidence was clearly sufficient to enable the jury to find Appellant guilty of Grand Theft as a principal within the meaning of Title 18, Section 2, United States Code, even though he was not present in the commission of the theft.

Appellant's Brief indicated distress at the fact that Appellant was found guilty of the offense of Grand Theft even though he did not participate directly in the acts constituting the theft.

Appellant himself apparently operated under the same misconception of the law at the time of the offense for on two occasions, after Appellant found the contractor's truck had been stolen and when he found the warehouse had been entered, he objected and in each instance related that, of course, he could not be held for what they did but only as a receiver or "fence" of stolen property. Such a belief fails to take into account Title 18, United States Code, Section 2.

CONCLUSION

The record of the trial suffices to show that the procedural complaints of the Appellant were without substance; joining him with a co-defendant who was co-actor in the transaction was proper under the circumstances, as was the discharge of the jury without his consent when it could not agree on a verdict, and permitting a group of persons who were prospective jurors to go to their homes while additional talesmen were called. Such acts were within the discretion of the Court and Appellant has been unable to show anything other than that the discretion was well exercised, and within the limits placed upon it by prior judicial decisions.

Even in the matter of the prejudicial question to the defense witness, Palen, the Appellant has demonstratively failed to show that he was prejudiced in the conduct of his defense or that the response of the Court to the situation could not and did not effectively remove any presumption of improper influence on the

jury as to the Appellant. Certainly, this is more than true when he was convicted in a second trial that was completely free of any lingering taint that may have existed in the first trial. Therefore, the records substantiate that the trials of the Appellant met reasonable standards of fairness.

It has been further shown that the Appellant may not rely upon the principles of double jeopardy and res judicata in seeking reversal of his conviction. The well-settled rules pertaining to double jeopardy and res judicata do not encompass the situation where the offenses are separate and a jury, by reason of its failure to agree on a verdict, was discharged and the Appellant retried on the unresolved charge. The tortuous application of the principles of the cases cited by the Appellant to the facts of his case can lead only to the conclusion that he is outside of their purview.

Therefore, it is submitted that, based upon the record and the state of the law as it now exists, the conviction was proper and should be affirmed.

Dated, Agana, Guam,
December 20, 1965.

JAMES P. ALGER,

United States Attorney,
District of Guam,

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Assistant United States Attorney,
District of Guam,

Attorneys for Appellee.

CERTIFICATE OF EXAMINATION OF RULES

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES P. ALGER,
United States Attorney,
District of Guam,
Attorney for Appellee.

(Appendix Follows)

Appendix.



Appendix

STATUTES INVOLVED

Penal Code of Guam

Section 459. Burglary defined. Every person who at any time enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, out-house, or other building, tent, vessel or any underground portion thereof, with intent to commit grand or petit theft or any felony is guilty of "burglary."

Section 484. Theft defined. Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, . . .

Section 487. "Grand theft" defined. "Grand theft" is theft committed in any of the following cases:

(1) When the money, labor, or real or personal property taken is of a value exceeding \$50.

(2) When the property is taken from the person of another.

United States Code

Title 18

Section 7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes: . . .

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent

of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building. . . .

Section 13. Laws of states adopted for areas within federal jurisdiction

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Title 28

Section 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929.

Section 1294. Circuits in which decisions reviewable

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . .

Title 48

Section 1424. District Court of Guam; jurisdiction; appellate division; rules of procedure

(a) There is created a court of record to be designated the "District Court of Guam", and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine . . .

(b) The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States pursuant to section 2072 of Title 28, in civil cases; section 2073 of Title 28, in admiralty cases; sections 3771 and 3772 of Title 18, in criminal cases; and section 53 of Title 11, in bankruptcy cases; shall apply to the District Court of Guam and to appeals therefrom; . . .

RULES INVOLVED**Federal Rules of Criminal Procedure****Rule 8. Joinder of Offenses and of Defendants**

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

No. 20,188

United States Court of Appeals
For the Ninth Circuit

VEIGH CUMMINGS,

Appellant,

vs.

LARRY R. BULLOCK and ARELETA BULLOCK,
his wife,

Appellees.

BRIEF OF APPELLANT

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THOMAS G.

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No. 20,188

United States Court of Appeals For the Ninth Circuit

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Appellant,

vs.

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Appellees.

BRIEF OF APPELLANT

STATEMENT OF JURISDICTIONAL FACTS

Jurisdiction of the District Court of the United States for the Northern District of California, Northern Division, is based upon diversity of citizenship, appellees being citizens of the State of California and appellant being a citizen of the State of Utah, and the amount of controversy exceeding \$10,000.00 excluding costs and interest.

STATEMENT OF CASE

This appeal is from a judgment that appellant take nothing by reason of his Complaint entered on the 12th day of March, 1965, by the Honorable Sherrill

Halbert, Judge of the United States District Court for the Northern District of California, Northern Division.

Appellant and appellees were parties to an agreement entitled "Lease with Option to Purchase", dated September 2, 1958. The lease covered land and personal property located in the State of Wyoming. The lease was for a period of two years from December 1, 1958, to December 1, 1960, the option to be exercised on or before December 1, 1960.

A part of the "Lease with Option to Purchase" was a "Uniform Real Estate Contract" which embodied the terms of the purchase agreement. The price of the land was \$40,000.00, a \$4,000.00 down payment and the balance at \$4,000.00 per year. The payment of the down payment, exercised the option. (See paragraphs 4 and 5 of lease and paragraph 3 of "Uniform Real Estate Contract" attached to the lease.)

The "Lease with Option to Purchase" provided that if the appellant exercised the Option to Purchase, the appellees agreed to sign an agreement of sale in accordance with the "Uniform Real Estate Contract."

The down payment and all other payments due on the "Uniform Real Estate Contract" were to be paid to the First National Bank of Evanston, Wyoming. The "Uniform Real Estate Contract" also provided that the appellees would place in escrow with the First National Bank of Evanston, Wyoming, the Warranty Deed to the premises to be delivered to the buyer on payment in full by the buyer to the Bank of the payments required by the "Uniform Real Estate Contract".

There is no dispute between the parties concerning the language of the documents which govern their transaction. The dispute arises as to the legal significance of the language.

The \$4,000.00 payment was received by the First National Bank of Evanston, Wyoming, on the 30th day of November, 1960. A letter with the payment contained a Warranty Deed and the "Uniform Real Estate Contract" to be executed by appellees, with instructions to the Bank that upon execution of the "Uniform Real Estate Contract" and the Warranty Deed, that the Bank should deliver the \$4,000.00 down payment to appellees. A copy of the letter of instructions to the Bank with copies of the "Uniform Real Estate Contract" and Warranty Deed were forwarded to the appellees in California, and were received by them on or about the 2nd of December, 1960, in California.

Appellee, Larry R. Bullock contacted the First National Bank of Evanston, Wyoming, on the 5th of December, 1960, and refused to execute the Warranty Deed and "Uniform Real Estate Contract" before receiving the \$4,000.00 down payment which the Bank had.

The Court found that the agreements which are quoted require, as a condition precedent, the unconditional payment by appellant to appellees of the \$4,000.00. That the requirement that they execute the Warranty Deed and the "Uniform Real Estate Contract" constituted a conditional acceptance of the options which appellees could reject.

STATEMENT OF POINTS**Point 1**

The District Court erred in its interpretation of the "Lease with Option to Purchase" and "Uniform Real Estate Contract" in determining that the \$4,000.00 down payment was to be paid without requiring appellees to execute the "Uniform Real Estate Contract" and Warranty Deed.

Point 2

The District Court erred in concluding that the options granted appellant in the "Lease with Option to Purchase" and "Uniform Real Estate Contract," was not properly exercised by appellant.

ARGUMENT**POINT 1****APPELLANT EXERCISED THE OPTION EXACTLY
AS AGREED BY ALL PARTIES.**

The trial Court is in error in its interpretation of the "Lease with Option to Purchase" and the "Uniform Real Estate Contract". These documents provide an obligation on the part of appellees to sign the "Uniform Real Estate Contract" and the Warranty Deed upon receipt of the down payment.

Where contracts require down payments, the execution of the contract and the down payment are, in normal business practice, concurrent acts by the parties. The down payment and the promises contained in the contract are the consideration for a vendor obligating himself to sell the premises for the price mentioned in the "Uniform Real Estate Contract".

The documents involved show clearly an installment sale covering real estate. The bank selected in Evans-ton, Wyoming, was the vendors' bank and it was their agent to whom these payments were to be made. The appellant would receive the Warranty Deed when full payment had been made. Prior to the payment in full, the "Uniform Real Estate Contract" would govern the rights of the parties.

The Statute of Frauds requires that there be a written document to create an enforceable agreement where the sale of land is contemplated. This is the function which the "Uniform Real Estate Contract" in the present controversy was to perform. Wyoming, Utah and California all have such statutes.

The law of Wyoming where the land is located and where the option was to be exercised, would, it is conceded, govern.

A modern Wyoming case setting forth the general law for the exercise of options is *Corey v. Corey's Little America, Inc.* Wyo., 378 P.2d 506. The rules for consideration of options are stated in the following quoted portions of the *Corey* case.

"An option is a continuing offer to sell and, even though it is conditioned for exercise within a limited time, the option is nevertheless an executory, unilateral contract. *Braten v. Baker*, 78 Wyo. 273, 323 P.2d 929, 931, 325 P.2d 880; *Baker v. Coleman*, 160 Fla. 297, 34 So.2d 538, 539. . . ."

"However options are to be strictly construed and where the option is to be exercised within a stated time and in a particular manner, that must be done exactly as prescribed unless, perhaps, there is some intervening circumstance which the

law recognizes as one of the impossibilities which make failure of compliance an exception to the rule. *Callisch v. Farnham*, 83 Cal.App.2d 427, 188 P.2d 775, 777; *Baker v. Coleman*, supra. . . .”

“It has been said there are two steps or elements to the exercise of an option: (1) The decision or election to exercise; and (2) the communication of that decision and election within the period limited. See *Milner v. Dudrey*, 77 Nev. 256, 362 P.2d 439, 443-444. . . .”

The *Covey* case, supra, is distinguishable on the facts from the case before the Court; the Wyoming Court has set down the rule governing the interpretation of contracts, such as before this Court. It also held:

“Along the same line the court, in *Gibbons v. Metropolitan Life Ins. Co.*, 62 Ohio App. 280, 23 N.E.2d 662, affirmed 135 Ohio St. 481, 21 N.E.2d 588, held it was necessary to consider all parts of a contract in order to determine the meaning of any particular part as well as the whole contract. 17 C.J.S. Contracts § 297, pp. 710-711, states that individual clauses must be considered in connection with the rest of the agreement and all parts of the writing and every word in it will, if possible, be given effect, citing authorities thereunder as well as in 17 C.J.S. 1962 Supplement, among which are cases from United States courts and those of 31 states. In the same volume at page 713, it is also noted that a construction neutralizing or nullifying one provision should not be adopted if a contract can be construed so as to give effect to all of its provisions; that a construction rendering a provision meaningless

should be avoided; and that it should be assumed particular clauses are in contract for a purpose."

The documents to be interpreted are entitled, "Lease with Option to Purchase" and "Uniform Real Estate Contract," and seem to be clear in their meaning. The language of the "Lease with Option to Purchase" reads as follows:

"4. Lessee is granted an Option to Purchase the aforesaid described premises for the sum of \$40,000.00, said option to be exercised on or before the 1st day of December, 1960 by payment to Lessors of the sum of \$4,000.00 which said \$4,000.00 shall be applied on the purchase price of \$40,000.00.

5. If Lessee shall exercise his Option to Purchase the leased premises, then and in that event Lessors agree to sign an agreement of sale in accordance with the Uniform Real Estate Contract attached to this Lease and Option, which said Uniform Real Estate Contract shall embody the terms of sale which shall govern between lessors and lessees if and when lessee exercises his option to purchase." (See Record page 7.)

The language of the "Uniform Real Estate Contract" attached to the "Lease with Option to Purchase" which is applicable, reads as follows:

"2. Witnesseth: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the county of Uinta, State of Wyoming, to-wit: Whipple Ranch. More particularly described as

follows: See attached Exhibit 'A' particularly describing premises.

Sellers and Buyer agree that sellers will execute a Warranty Deed to the Whipple Ranch premises covering said real property and the personal property leased by sellers to buyer under the terms of that certain lease and option agreement dated September 2, 1958. The Warranty Deed to the real property shall be placed in escrow with the First National Bank of Evanston, Wyoming, to be delivered by said bank to buyer upon receipt in full by the Bank of the payments required under this contract. Bill of Sale to personal property to be delivered upon receipt of payment due December 1, 1960.

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of Forty Thousand and no/100 * * * Dollars (\$40,000.00) payable at the First National Bank, Evanston, Wyoming strictly within the following times, to-wit: Four Thousand and no/100 * * * Dollars (\$4,000.00) cash, the receipt of which is hereby acknowledged, and the balance of \$36,000.00 shall be paid as follows: \$4,000.00 on the 1st day of December, 1961, and a like sum on the 1st day of December each year thereafter until the balance owing is paid in full. Possession of said premises shall be delivered to buyer on the 1st day of December, 1960." (See Record page 10.)

The trial Court found that the requirement by appellant that the appellees execute the "Uniform Real Estate Contract" and the Warranty Deed at the Evanston First National Bank defeated his exercise of the option and made his tender conditional.

This holding is clearly contrary to the general rule governing the exercise of options.

A case from the United States Court of Appeals for the Tenth Circuit, exactly in point, holds in appellant's favor. In *Merrion et al. v. Scorup-Somerville Cattle Co. et al.*, 134 F.2d 473 (Cert. denied 319 U.S. 760, 63 S.Ct. 1317, 87 L.Ed. 1712) the Court held (p. 477):

“Defendants contend that the acceptance of the contract was conditional and therefore amounted to a rejection of the offer. The material part of the letter of acceptance reads as follows: ‘We, the undersigned, on this 27th day of August, 1941, hereby notify the Scorup-Somerville Cattle Company and its President, J. A. Scorup, that we hereby exercise Option No. 1, hereinbefore described, and we hereby tender to the Scorup-Somerville Cattle Company payment of the purchase price, as provided in said Option, upon satisfactory and proper conveyance by the Scorup-Somerville Cattle Company to the undersigned of all of the assets owned by said company on the date of said option and thereafter, including 1000 acres, more or less, of irrigated land, 17,000 acres, more or less, of pasture land, 10,000 acres, more or less, of range land, approximately 9,000 cattle, approximately 3000 calves, etc.’

“The acceptance itself was unconditional and absolute. The most that can be said is that the tender of payment made at that time was conditional. The tender made was, however, of the full purchase price, not the initial payment of the \$74,000 called for in the contract. Certainly when plaintiffs tendered the full purchase price they

would be entitled to demand proper conveyance of the assets for which they were paying.”

An additional holding by United States Circuit Court that the exercise of an option does not become conditional by reason of the option holder demanding a Deed, is *Grey v. Nickey Bros., Inc.*, 271 Fed. 249 (C.C. of A., Fifth Circuit, February 2, 1921). In this case, the language which the appellee used was as follows:

“Will exercise our option to buy land West Carroll Parish, La. Mail deed with draft to our bank here. Answer.”

The problem created by variance in the offer and acceptance on sale of land contracts has been the subject of an annotation at 149 A.L.R. 205. The rule is stated that it is elementary law that in order to form a contract the offer and acceptance must express assent to one and the same thing and that there must be no material variance between them. Numerous cases are cited and discussed which support this general proposition.

Appellant in the case before the Court, exercised the option in exactly the manner which was contemplated by the “Lease with Option to Purchase” and “Uniform Real Estate Contract” and placed the \$4,000.00 down payment in the Evanston First National Bank prior to the 1st day of December, 1960, and requested that the performance by the appellees of the obligation required by them under those agreements, that is, the execution of the Warranty Deed and the execution of the “Uniform Real Estate Contract.” There was

absolutely no variance in the manner of appellant's exercising the option and the trial Court's decision that the option was not exercised in the manner contemplated is erroneous.

CONCLUSION

It is respectfully submitted that the Court order entry of judgment in favor of the appellant against the appellees requiring specific performance of the "Lease with Option to Purchase" and the "Uniform Real Estate Contract" in accordance with the terms of said documents, and order the trial Court to award to the appellant reasonable attorney's fees as required by the terms and conditions of the aforementioned documents.

Dated, September 23, 1965.

Respectfully submitted,
JOHN R. SALDINE,
DWIGHT L. KING,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DWIGHT L. KING,
Attorney for Appellant.

No. 20,188

United States Court of Appeals
For the Ninth Circuit

VEIGH CUMMINGS,

Appellant,

vs.

LARRY R. BULLOCK and ARELETA BULLOCK,
his wife,

Appellees.

BRIEF OF APPELLEES

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FRANK H. SCHMIDT, Clerk

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United States Court of Appeals

For the Ninth Circuit

VEIGH CUMMINGS,

Appellant,

vs.

LARRY R. BULLOCK and ARELETA BULLOCK,
his wife,

Appellees.

BRIEF OF APPELLEES

STATEMENT OF THE CASE

1. Introduction

This is a suit brought by Appellant for a decree of specific performance to compel Appellees to sell to Appellant certain real property situated in the State of Wyoming, under the terms of a written Lease containing an Option to Purchase.

Appellant appeals from the judgment entered on the 12th day of March, 1965, by the Honorable Sherrill Halbert, Judge of the United States District Court for the Northern District of California, Northern Division, decreeing that Appellant take nothing by reason of his Complaint.

2. The Facts of This Case

On September 2, 1958, Appellees and Appellant entered into a written agreement entitled Lease With

Option to Purchase (P's Ex. 1), hereinafter referred to as Lease, under the terms of which Appellees leased to Appellant certain real property situated in the State of Wyoming.

Paragraphs 4 and 5 of said Lease, provide as follows:

"4. Lessee is granted an Option to Purchase the aforesaid described premises for the sum of \$40,000.00, said Option to be exercised on or before the 1st day of December, 1960, *by payment to Lessors* of the sum of \$4,000.00 which said \$4,000.00 shall be applied on the purchase price of \$40,000.00." (Emphasis ours.)

"5. If Lessee shall exercise his Option to Purchase the leased premises, *then and in that event Lessors agree to sign* an agreement of sale in accordance with the Uniform Real Estate Contract attached to this Lease and Option, which said Uniform Real Estate Contract shall embody the terms of sale which shall govern between Lessors and Lessee *if and when Lessee exercises his option to purchase.*" (Emphasis ours.)

Paragraph 3 of said Uniform Real Estate Contract, which was attached to said Lease, bearing the date of December 1, 1960, and which was not signed by either of the parties, provided as follows:

"3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of Forty Thousand and no/100.....Dollars (\$40,000.00) payable at the office of Seller, his assigns or order, First National Bank, Evanston, Wyoming strictly within the following times: Four Thousand and no/100.....(\$4,000.00) cash,

the receipt of which is hereby acknowledged, and the balance of \$36,000.00 shall be paid as follows: \$4,000.00 on the 1st day of December, 1961, and a like sum on the 1st day of December each year thereafter until the balance owing is paid in full" (Emphasis ours.)

On February 1, 1960, Appellant entered into a contract, together with his wife, under the terms of which they sold the subject property to Arthur Evans, Hazel Evans, Alma Evans, and Carma Evans for the sum of \$75,000.00. (Ds' Ex. C.)

On July 27, 1960, Appellant's then attorney, Dwight L. King, sent to Appellees a letter (P's Ex. 3) in which Mr. King stated that he had received notice from Appellant that Appellant *was planning* on exercising said Option to Purchase. Mr. King further stated that *as soon as the Warranty Deed and the Uniform Real Estate Contract are placed in the bank*, Appellant informed Mr. King that Appellant *would be able* to pay the Option payment of \$4,000.00 which was due on the 1st day of December, 1960.

In September, 1960, Appellees moved from their residence at 3139 Walnut Avenue, Carmichael, California, to their new home situated at 6201 Westbrook Drive, Citrus Heights, California. Appellant was notified of said change of address by a letter from Appellees dated October 1, 1960 (P's Ex. 5), as was Appellant's attorney, Mr. King. (RT 18, 21, 58-59.)

Mr. King testified that by letter dated November 28, 1960, which Appellees have stipulated was received by the addressee on November 30, 1960, he forwarded to

the said First National Bank of Evanston, Wyoming, a certified check in the sum of \$4,000.00 payable to Appellees, together with a Deed and copy of the said Uniform Real Estate Contract, with instructions that *after* Appellees had executed said Deed and Uniform Real Estate Contract, said bank was authorized to deliver said check to Appellees.

On November 29, 1960 (RT 74), Mr. King sent a letter dated November 28, 1960 (P's Ex. 6), addressed to Appellees, at the latter's former address in Carmichael, California (RT 74), which letter was not received by the Appellee, Areleta Bullock, until December 5, 1960. (Ds' Ex. D; RT 72-73.) In said letter (P's Ex. 6), Mr. King enclosed a Uniform Real Estate Contract covering the sale of said ranch (Ds' Ex. A), together with a Deed of said property, in which Deed Appellant's wife, Jo Ellen Cummings, was named as a Grantee with Appellant (Ds' Ex. B). Mr. King further stated in said letter that Appellant had placed in Mr. King's hands, a Cashier's Check (*the amount of which was not stated in said letter*), and which check had been forwarded by Mr. King to the First National Bank of Evanston, Wyoming, with instructions to the bank that it was to forward said check to Appellees upon receipt from Appellees of said Uniform Real Estate Contract and Deed properly executed by Appellees.

Mrs. Bullock testified that when she received said letter (P's Ex. 6), that she did not open the same (RT 75-76), but forwarded it directly to Mr. P. W. Spauld-

ing, who was Appellees' attorney in Wyoming, which letter was received by Mr. Spaulding on December 7, 1960. (Ds' Ex. E.) Mr. Bullock was in Wyoming at that time, and accompanied by Mr. Spaulding (RT 30) the two of them went to said bank where Mr. Bullock requested that the bank pay him said sum of \$4,000.00, but the bank refused, stating that its instructions were that it was not to pay said sum of money to Mr. Bullock unless and until the Appellee first executed the said Uniform Real Estate Contract and Deed which had been mailed to Appellees by Mr. King in Mr. King's letter of November 28, 1960 (RT 25-26, 30.)

Mr. Bullock's testimony, which was not disputed by Appellant, was that at the time the Lease was executed the manner in which the Option to Purchase was to be exercised was discussed with Appellant, it being stated that Appellees would not execute any documents until they had first received the sum of \$4,000.00. (RT 33.) Mr. Bullock's uncontradicted testimony was that it was his understanding (Paragraph 4 of the Lease) that the sum of \$4,000.00 was to be paid directly to Appellees before they executed any documents. (RT 36, 38.)

Based on the foregoing, and the fact that Mr. Bullock had not received the sum of \$4,000.00 (RT 25), Mr. Bullock, on the advice of his counsel (RT 26), refused to sign either the Uniform Real Estate Contract or the Warranty Deed proffered to him by the bank. (RT 26, 31.)

Said Warranty Deed (Ds' Ex. B) which Mr. Bullock was required to execute before being paid the sum of \$4,000.00, contained the additional name of Appellant's wife, as Grantee, with whom Appellees never had any dealings (RT 25-26), and who was not a party to either the Lease or the aforementioned Uniform Real Estate Contract that was presented to Mr. Bullock by the bank for signature.

Appellant confirmed Mr. Bullock's testimony that at no time either prior to or subsequent to December 1, 1960, had he mailed directly to Appellees, the sum of \$4,000.00. (RT 26, 51.)

The District Court found that under the terms of said Lease, the unconditional payment by Appellant to Appellees of the sum of \$4,000.00 not later than December 1, 1960, was a condition precedent to any obligation on the part of Appellees to execute said Uniform Real Estate Contract and Warranty Deed, and by reason of Appellant's failure to exercise the Option to Purchase, in accordance with the terms of said Lease, Appellees have no obligation to sell said real property to Appellant.

QUESTIONS PRESENTED

I. Whether the District Court erred in its interpretation of the Lease with Option to Purchase and Uniform Real Estate Contract in determining that Appellant could exercise the Option to Purchase only by unconditionally delivering to Appellees the sum of

\$4,000.00 on or before December 1, 1960, and that Appellant did not properly exercise said Option to Purchase.

II. Whether the District Court properly concluded that Appellant was not entitled to a Decree for Specific Performance.

III. Whether the District Court properly concluded that Appellant was not entitled to attorney's fees.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN ITS INTERPRETATION OF THE LEASE WITH OPTION TO PURCHASE AND UNIFORM REAL ESTATE CONTRACT IN DETERMINING THAT APPELLANT COULD EXERCISE THE OPTION TO PURCHASE ONLY BY UNCONDITIONALLY DELIVERING TO APPELLEES THE SUM OF \$4,000.00 ON OR BEFORE DECEMBER 1, 1960, AND THAT APPELLANT DID NOT PROPERLY EXERCISE SAID OPTION TO PURCHASE.

Preliminarily, it is to be noted that inasmuch as the subject Lease was executed in the State of Utah, and relates to real property situated in the State of Wyoming, and the trial of this matter occurred in the State of California, the subject of conflicts of law arises. In order to answer the questions here presented, the substantive law of the State of California must be looked to (*Erie Railroad Company v. Tompkins*, 304 U.S. 64) including the applicable California choice of law rules. (*Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487.) Under California law, questions affecting the title to real property are determined by the *lex loci rei sitae*. (*Lawson v. Blodgett*, 1 C.A. 13; *In*

Re Patmore's Estate, 141 C.A.2d 416.) Where there is no statute or case law covering a case in which the law of another state should apply, then the Courts of California will assume that the law of such other state is not out of harmony with that of California, and the Court will look to California law for its solution of the problem. (*Gagnon Co. Inc. v. Nevada Desert Inn*, 45 Cal.2d 448, 454; *Aldabe v. Aldabe*, 209 C.A.2d 453, 471.)

No Wyoming law relative to the issues of this case have been found which are incompatible with California law, and accordingly it will be assumed that the applicable substantive law is in agreement with that of California. (*Wells v. Wells*, 74 C.A.2d 449.)

As previously stated, Mr. Bullock testified that he did not execute the Uniform Real Estate Contract and Warranty Deed presented to him by the bank in Wyoming subsequent to December 1, 1960, for the reason that neither he nor his wife had ever been paid the sum of \$4,000.00. In addition, said Deed contained the name of Appellant's wife as an additional Grantee, which addition had never been authorized by Appellees.

The law of Wyoming is that Options to Purchase are to be strictly construed, and where an option is to be exercised within a stated time and in a particular manner, that must be done exactly as prescribed. (*Covey v. Coveys Little America Inc.*, 378 P.2d 506.) It seems perfectly clear from a reading of the hereinbefore quoted provisions of Paragraph 4 of the subject Lease (P's Ex. 1), that the parties specifically con-

tracted as to the manner in which Appellant was to exercise said Option to Purchase, namely, "by payment *to Lessors* on or before December 1, 1960, of the sum of \$4,000.00."

In Paragraph 5 of said Lease, Appellees agreed that *if*, Appellant exercised his Option to Purchase the leased premises, *then and in that event*, Appellees agreed to sign an Agreement of Sale *in accordance with* the Uniform Real Estate Contract attached to the Lease, which Uniform Real Estate Contract shall embody the terms of sale which shall govern between Appellant and Appellees, *if and when Appellant exercised his Option to Purchase*.

The law is clear that the act or acts which constitute the acceptance of an offer tendered in an option agreement are determined by the terms of the contract itself, and where the acceptance, or the election, or the exercise of the option is by the terms of the contract to be made in a particular manner, it must be strictly so made in order to constitute a valid acceptance. (*Calliach v. Farnham*, 83 C.A.2d 427, 430.)

Section 1436 of the *California Civil Code* defines a condition precedent as one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.

In Section 1439 of the *California Civil Code*, it is stated in part that before any party to an obligation can require another party to perform any act under it, *he must fulfill all conditions precedent thereto imposed upon himself . . . (Italics ours.)*

That payment to Appellees by Appellant of said sum of \$4,000.00 was a condition precedent to Appellees being required to execute the documents described in said Lease, seems so obvious as to require no further discussion.

Even though not expressly stated in said Lease, the law is that time is of the essence of an Option to Purchase within a specified time, even though not expressly so made by the contract. (*Rosenaur v. Pacelli*, 174 C.A.2d 673, 677.) In this regard, the evidence is uncontradicted that Appellant did not pay to Appellees the said sum of \$4,000.00 on or before December 1, 1960.

Appellant's contention that he properly exercised the Option to Purchase by depositing said sum of \$4,000.00 in the bank in Wyoming, and was justified in requiring Appellees to execute the Uniform Contract of Sale and Warranty Deed before Appellees were entitled to receive said sum of \$4,000.00 is completely untenable. In this regard, Paragraph 5 of the Lease states that if Appellant exercises his Option to Purchase, Appellees then agree to sign an Agreement of Sale *in accordance with* the Uniform Real Estate Contract attached to the Lease. Suffice to say that, at the time of the execution of the Lease, said Uniform Real Estate Contract was not signed by any of the parties, but was simply attached to the Lease as an exhibit of the form of Contract of Sale to be executed by the parties if and when Appellant exercised his Option to Purchase.

Moreover, in Paragraph 3 of said Uniform Real Estate Contract, it states that Appellees acknowledged receipt of the sum of \$4,000.00 in cash, hence clearly envisioning the fact that said sum of \$4,000.00 was to have been paid to Appellees on or before December 1, 1960, pursuant to the terms of the Option to Purchase contained in said Lease, and only the remaining balance of \$36,000.00 was to be paid in said bank.

Moreover, nowhere, neither in the Lease nor in the Uniform Real Estate Contract is any provision made for an escrow arrangement with respect to the execution of the Uniform Real Estate Contract and the payment of the first \$4,000.00. Payment under the escrow conditions set up by the Appellant, was neither to Appellees nor to the bank as the agent of Appellees, but rather to the bank as an agent of Appellant.

The Lease clearly contemplates that payment of the \$4,000.00 directly to Appellees was a condition precedent to Appellees' obligation to execute the Uniform Real Estate Contract. There was no provision contained in said Lease, that Appellant's payment of said sum of \$4,000.00 to Appellees could be made conditional upon Appellees executing said Real Estate Contract and said Warranty Deed.

The only document that can govern the conditions for the exercise of the subject Option to Purchase is the Lease, which document is the only agreement that contains the terms of the Option and the manner of its performance, and is the only document ever executed by all of the parties.

The deposit by Appellant's attorney of said sum of \$4,000.00 in said bank is of no force or effect for the further reason that an offer to pay extinguishes an obligation only if the amount is deposited in a bank in the name of the creditor, *unconditionally, and in such manner that it at once becomes the creditor's property.* (*Righetti v. Righetti*, 5 C.A. 249, 251; *Verdier v. Verdier*, 133 C.A.2d 325, 333.) Admittedly, said deposit was not made unconditionally, but rather subject to Appellees first executing the Uniform Real Estate Contract as well as a Warranty Deed containing, as hereinbefore mentioned, the additional name of Mrs. Cummings as a Grantee, to which Appellees had never agreed.

The case of *Bourdieu v. Baker*, 6 C.A.2d 150, is almost identical with the within action. In that case the plaintiff granted the defendant an Option to Purchase certain real property, under the terms of which the price for the property was \$25,000.00, and to be paid as follows: "\$3,000.00—on or before 30 days from date hereof, the balance to be paid on or before 6 months from date hereof, or purchaser to assume mortgage of \$22,000.00—and clear other property also included in said mortgage." Within the stated time, the defendant caused the sum of \$3,000.00 to be placed with a bank with instructions to deliver the same to plaintiff, conditioned upon plaintiff, amongst other things, first executing a Deed of the property to defendant. The Court held that the defendant did not comply with the terms of the Option in that the Option did not require the plaintiff to first

execute a Deed for said premises to defendant before being entitled to receive said sum of \$3,000.00. The Court states on page 158 of the Opinion that the acceptance of such an offer must be unconditional, must be in accordance with the terms of the offer, and an acceptance based upon terms varying from those offered constitute a rejection of the offer. On page 161 of the Opinion, the Court held that the deposit of said sum of money to be paid to the plaintiff only on unauthorized conditions, did not comply with the terms of the Option Agreement, and was not a sufficient tender or offer of performance. (See also *Fabares v. Benjamin*, 180 C.A.2d 264.)

Appellant claims as being exactly in point and in his favor, the case of *Merrion et al. v. Scorup-Somerville Cattle Co. et al.*, 134 F.2d 473. With this claim, Appellees cannot agree.

The *Merrion* case is clearly distinguishable from the within action, in there the Court simply held that the Optionee's demand that payment would not be made pursuant to the exercise of the Option to Purchase until receipt from the Optionor of the properly executed documents of conveyance was not objectional, as the Optionee was not simply tendering the first payment called for by the Optionee, but rather the full purchase price. Hence while the exercise of the Option to Purchase was conditional, such condition was permissible because when the Optionee tenders the entire purchase price, he is entitled to demand proper conveyance of the assets which he is paid.

Appellant next cites the case of *Grey v. Nickey Bros., Inc.*, 271 Fed. 249, as standing for the proposition that the exercise of an option does not become conditional by reason of the option holder demanding a deed. A reading of that case, shows that the Court made no such general statement, but rather that such statement was limited to the specific facts of the case.

In *Grey v. Nickey Bros., Inc.*, supra, the facts show that an Option to Purchase was given to be exercised within 30 days; that upon exercise of the option within the time specified, the Optionee was to pay to the Optionor the sum of \$20,000.00 on account of the purchase price of \$50,600.00 *upon the delivery to Optionee of a valid fee simple deed with full covenants of warranty, conveying an absolutely unencumbered fee simple title.* The Court there held that the express terms of the Option to Purchase unmistakably required, as a condition precedent to Optionee having to pay the sum of \$20,000.00, the delivery by Optionor to Optionee of said deed.

Inasmuch as Paragraphs 4 and 5 of said Lease (P's Ex. 1) expressly prescribed that if Appellant desired to exercise said Option to Purchase, he was to do so by payment to Appellees of the sum of \$4,000.00 on or before December 1, 1960, and that Appellees had no obligation to sign a Uniform Real Estate Contract or Deed unless and until Appellant exercised said Option in the aforementioned manner, it is submitted that in view of Appellant's *conditional* deposit of said sum of \$4,000.00 in said bank, which was to be paid to

Appellees only after Appellees had executed the Uniform Real Estate Contract and Deed in a form never authorized, Appellant failed to exercise said Option in accordance with its terms.

As stated in *Briles v. Paulson*, 170 Cal. 196, 198-199:

“The defendant did not convert the option into an agreement of sale, binding upon the plaintiff, except by complying with the conditions upon which the plaintiff had agreed to sell. Acceptance must be made and conditions performed within the time, if any, limited by the option, in order to constitute a contract of sale, time being of the essence in such contracts. A Court of Equity would not be justified in relieving a party from the effect of his failure to comply with the conditions on which he had been granted the privilege of buying. This would be making a new contract for the parties, and compelling the owner to sell when he had not agreed to do so. The assent or act of acceptance . . . whether by payment or the fulfillment of some other condition, was necessarily to be made within the time limited; otherwise, no contract could be consummated.”

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT APPELLANT WAS NOT ENTITLED TO A DECREE FOR SPECIFIC PERFORMANCE.

An additional and cogent reason for denial to Appellant of a Decree of Specific Performance is that Appellant has failed to allege and prove adequacy of consideration and that the agreement is not as to the Appellees unconscionable or inequitable.

The long-established uninterrupted rule of law in the State of California is that in an action for specific performance, plaintiff must allege in the complaint and prove at the trial that the contract is supported by adequate consideration and is just and reasonable as to the party against whom specific performance is sought. (*Civil Code*, Section 3391, Sub-Paragraphs 1 and 2; *Milton Kauffman Inc. v. Smith*, 82 C.A.2d 302, 304-305; *Mayers v. Alexander*, 73 C.A. 2d 752, 760; and cases listed in Volume 21B McKinney's New California Digest, "*Specific Performance*" Sections 116 and 117.)

Appellant failed to allege and prove adequacy of consideration and that to enforce said Option to Purchase would be fair and just to Appellees. It should of course be noted that Appellant a little over a year subsequent to the execution of said Lease had sold the subject property for the sum of \$75,000.00, \$35,000.00 in excess of what he had agreed to pay for the same.

By reason of the premises, it is submitted that Appellant should be denied specific performance.

III. THE DISTRICT COURT PROPERLY CONCLUDED THAT APPELLANT WAS NOT ENTITLED TO ATTORNEY'S FEES.

Appellees have found no Wyoming authorities concerning the allowance of attorney's fees.

The rule in California is that attorney's fees are not recoverable by a successful party in an action either at law or in equity, except in enumerated in-

stances where they are expressly allowed by statute. (*Miller v. Kehoc*, 107 Cal. 340; *Code of Civil Procedure*, Section 1021.)

In the instant case, Appellant requests attorney's fees on the ground that Paragraph 21 of the Uniform Real Estate Contract that was attached to the Lease, provided that if either Buyer or Seller defaulted in any of the covenants or agreements contained in the *Uniform Real Estate Contract*, the defaulting party should pay a reasonable attorney's fee which might arise or accrue from enforcing this agreement (Uniform Real Estate Contract), when obtaining possession of the premises covered by said Contract.

The answer to this contention of Appellant is that said Uniform Real Estate Contract was never executed by Appellees, and under the above authorities, could not possibly furnish the basis for an allowance of attorney's fees. It must be remembered that the only document executed by the parties, was the Lease, and said document had no provision whatsoever for attorney's fees.

In addition, Appellant has no basis for recovering attorney's fees due to the fact that Appellant failed to exercise said Option to Purchase and is not entitled to a Decree for Specific Performance.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Judgment in this matter heretofore made on the 12th day of March, 1965, be affirmed.

Dated, Sacramento, California,
November 19, 1965.

Respectfully submitted,
HOWARD A. POTTS,
Attorney for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HOWARD A. POTTS,
Attorney for Appellees.

NO. 20185

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT HOOPES and RAE S.)
HOOPES,)
)
 Appellants,)
)
 vs.)
)
UNION OIL COMPANY OF)
CALIFORNIA, a corporation,)
)
 Appellee.)
_____)

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market value of their leased service station resulting when the lessee-operator failed financially and abandoned the station allegedly due to the onerous provisions of an illegal requirements contract in restraint of trade between the lessee-operator and Appellee Union Oil, the gasoline supplier.

B. Whether appellants as lessors of a service station state a cause of action for price discrimination under the Robinson-Patman Act, 15 U.S.C. Section 13, when they were not at any time relevant to this case operators of the service station and were never either purchasers of products from or competitors of the alleged discriminator, Union Oil.

C. Whether an action commenced January 18, 1963, under the anti-trust laws by a contract vendor and later lessor of a service station for damages arising out of an alleged contract in restraint of trade is barred by the four year anti-trust statute of limitations, 15 U.S.C. Section 15b, when the last overt act in completing the alleged contract in restraint of trade occurred on December 21, 1955, more than

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I.

STATEMENT OF JURISDICTION AND PLEADINGS

A. Jurisdiction of Trial Court.

The Trial Court had original jurisdiction of appellants' First Cause of Action (R.1-18, 119) under the provisions of 15 U.S.C. §15, based upon their allegation of violations of 15 U.S.C. §§ 1 & 2 and 15 U.S.C. § 13 as specifically re-referred to in appellants' Amendment to their First Cause of Action (R.119).

B. Jurisdiction of this Court.

This Court has jurisdiction under 28 U.S.C. § 1291 of the Appeal from the Partial Summary Judgment of the Trial Court (R.205-6) in favor of Appellee Union Oil dismissing appellants' first cause of action. The Trial Court expressly determined pursuant to Rule 54 (b), F.R. Civ. P., that there was no just reason for delay in entry of Final Partial Summary Judgment (R.201-2).

C. Summary of Pleadings.

Appellants have alleged certain anti-trust violations in their first cause of action (R.1-18) as well as allegations of tortious interference with their property in their second

and third causes of action (R.18-21) against Appellee Union Oil Company of California. After the conclusion of lengthy pre-trial proceedings, covering a period of two years and four months, Appellants' first cause of action was dismissed by the District Court (R197-200, 205-6) upon Union Oil's Motion for Partial Summary Judgment (R.187-93). Appellants' second and third causes of action are not in issue in this appeal.

II.

COUNTER-STATEMENT OF THE CASE

Appellee Union Oil is restating the Statement of the Case pursuant to Subparagraph 3 of Rule 18 of the Amended Rules of the Ninth Circuit because it does not feel that the appellants have adequately stated the case in their opening brief.

A. Earlier Litigation Between the Parties.

This action was commenced by plaintiff-appellants Robert Hoopes and Rae S. Hoopes against defendant-appellee Union Oil Company of California on January 18,

1963 (R.1) subsequent to and as a direct outgrowth of earlier litigation between the same parties in the Superior Court of the State of Alaska for the Fourth Judicial District.

In that earlier proceeding, by a Judgment entered April 11, 1962 (R.24), the Alaska Superior Court dismissed Union Oil's complaint against the appellants in this proceeding wherein it sought leasehold possession of a gasoline service station owned by Robert Hoopes and damages. The Alaska Superior Court also dismissed Hoopes' counter-claim for damages against Union Oil.

The District Court below in its Pre-Trial Order (R.114-18) determined that the issues of fact and law as stated by the Alaska Superior Court in its Findings of Fact 2 through 31 (R.26-36), Conclusions of Law 2 through 6 and 13 (R.37-9), and the Memorandum Opinion of Judge Rabinowitz (R.63-90) as incorporated in the Findings and Conclusions, were conclusively established in this proceeding.

B. Description of Parties

Appellants are owners of a gasoline service sta-

tion site and facilities in Fairbanks, Alaska (R.5). During the period relevant to this case, the service station was operated either by a contract purchaser from appellants or by a lessee from appellants and was never operated by appellants themselves (R.5-9, 12, 31, 33-4).

Appellee is a California corporation engaged in the business of producing, refining and marketing petroleum products in the Western portion of the United States (R.2, 133-4) and sold its products in Fairbanks, Alaska to the operators of appellants' service station (R.9-12). At no time relevant to this case did appellants purchase any of appellee's products (R.215).

C. Transactions between Appellant Robert Hoopes,
the Station Operators and Appellee Union
Oil Company

The Findings (R.26-36) and Conclusions (R.37-9) and the Memorandum Opinion (R.63-90) of Judge Rabinowitz of the Alaska Superior Court, along with the allegations of Plaintiff's Complaint, (R.1-18) describe in detail certain transactions which form the basis for appellants'

anti-trust claims as delineated in the Pre-Trial Order of the District Court (R.114-18) and which for the purpose of this appeal are either binding upon the parties or must be deemed to be true in reviewing the propriety of the entry of Summary Judgment.

From 1945 until March, 1951, appellants were the owner-operators of the service station in issue and purchased gasoline from appellee Union Oil (R.66-8). From March, 1951 to December 21, 1955, appellants leased the service station to Victor Hart who continued to purchase gasoline from Union Oil (R.28, 68). No claims are made by appellants against Union Oil relating to this period from 1945 to December 21, 1955.

On December 21, 1955, at the conclusion of various discussions between Robert Hoopes, Victor Hart and Union Oil officials, a series of documents was executed. The appellants Hoopes as owners, sold the service station site and facilities under contract to Victor Hart for \$125,000, upon the down payment of \$25,000 and the balance payable in monthly instalments, with title to be retained in appellants until the full purchase price was

paid (R.6, 31-2 , 76).

On that same date Union Oil leased the premises from Victor Hart with appellants' consent for a period of fourteen years at a rental of one and one-half cents for all gasoline purchased by Hart from Union Oil with a guaranteed minimum rental of \$217.70 (R.6-7, 32, 71-2). Simultaneously, the premises were leased back by Union Oil to Hart for the same period of fourteen years for the rental of one and one-half cents for all gasoline purchased by Hart "whether purchased from Union Oil or not" and containing a provision authorizing Union Oil to terminate the lease-back on seven days' notice (R.7, 32, 73). Although there was no express written commitment by Union Oil to do so, Union Oil verbally agreed to give Hart as the station operator a one cent per gallon discount (R.7, 32), which appellants had specifically requested on behalf of Hart (R.29).

Appellants allege the discount was not allowed to other operators and was "arbitrarily discontinued and not allowed to Victor Hart's successors" at the service

station in issue (R.8).

Hart then mortgaged the real property and chattels to the Seattle-First National Bank to secure a loan issued by the bank for the \$25,000 purchase price down payment. The appellants received the net proceeds from this loan. The loan was to be repaid by Hart's authorizing Union Oil to pay the bank directly the one and one-half cent per gallon rental payable by Union to Hart (R. 8 , 32-3, 74-6).

Victor Hart operated the service station until February 10, 1956, when he subleased the premises with Union Oil's consent to Schroeder & Wisel, who operated the station for approximately one year (R.12, 33-4, 77), when they together with Hart incorporated as Transfare, Inc., which, again with Union's consent, proceeded to operate the station until May, 1958 (R.34). These successors to Hart continued to purchase Union Oil gasoline under the contractual arrangements executed by Victor Hart (R.12, 33-4, 77).

On May 18, 1958, Hart and Transfare quitclaimed their interest in the premises back to appellants who immediately leased the station to Transfare for a five

year term for a fixed rental of \$875 per month (R.34, 77).

Upon the protest of appellants, Transfare, which had deducted from its payment of rent to appellants the amount of rent payable to Union Oil, in July, 1958 discontinued paying any further rent to Union Oil, whereupon Union Oil gave notice of default under the leaseback agreement and of its intention to claim possession of the station and to operate the premises itself (R.13, 34,77). Union Oil continued making the monthly payments due the Seattle-First National Bank under Hart's purchase loan, although no rentals were paid Union Oil and it did not have possession of the premises (R.34-5, 77-8).

Judge Rabinowitz in his Findings and Conclusions determined that Union Oil was not entitled to possession or damages for the reason that by the lease agreement between Victor Hart as owner (contract vendee)-operator and Union Oil, and as consented to by the appellants as contract vendors, -

"[Union Oil] was not at any time, pertinent herein, entitled to possession of all or a portion of the subject premises and, therefore, defendants [Hoopes] did not reach any agreement with the plaintiff [Union Oil]

by their failure to surrender possession when so demanded by plaintiff. What we do find is a requirements contract which purported to bind Hart [not Hoopes]... to purchase Union's gasoline for sale from the subject premises." (R.79, see also R. 35-6).

Judge Rabinowitz further determined that Robert Hoopes was not obligated by his consent to the lease-leaseback agreement to pay rent when Hart defaulted on the leaseback and accordingly Union Oil's claim for damages was also denied (R.85-6, 88).

Judge Rabinowitz also considered the Hoopes' affirmative defense that the "requirements contract" violated §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act and was therefore unenforcible, and concluded:

"11. Defendants [Hoopes] have failed to sustain their burden of proof with regard to allegations contained in their seventh affirmative defense pertaining to violations of the Sherman Act and of the Clayton Act." (R.39).

"...The Court concludes that defendants have not established that performance of [the lease-leaseback and related documents] would probably foreclose competition in a substantial line of the commerce affected throughout the area of effective competition. Since the Court does not find a violation of § 3 of the Clayton Act, determination of the issues raised under §§ 1 and 2 of the Sherman Act become un-

necessary. (Tampa Electric Co. v. Nashville Co.) [365 U.S. 320 (1961)] p. 335. ... There is no issue as to a Robinson-Patman Act violation ... Further, note that no issue was raised as to common law illegal restraint". (R.90).

However, Judge Hodge in his Pre-Trial Order ruled that the doctrine of collateral estoppel does not apply to the anti-trust Finding of Fact No. 32 (R.36-7) and Conclusion of Law 11 (R.39) of Judge Rabinowitz for the reason that they were not essential to the judgment dismissing Union Oil's complaint in that proceeding (R.109-111).

Subsequent to the Alaska Superior Court litigation appellants allege that Union Oil continued to make claims that the station must be exclusively used for the sale of Union Oil gasoline, with the alleged result that it was impossible for appellants to sell or lease the station (R.16).

D. Anti-Trust Issues as Defined in Pre-Trial Order

The Pre-Trial Order of Judge Hodge (R.114-18), who initially conducted the pre-trial proceedings, states that the anti-trust issues to be determined are: Whether the so-called exclusive requirements contract and the related transactions constituted a contract in restraint of

trade under Section 1 of the Sherman Act, 15 U.S.C.

1, or a monopoly under Section 2 of the Sherman Act, 15 U.S.C.

2 (R. 116, 117, ¶6(1) and (3)); whether Union Oil was discrimi-

ating in price, services or facilities in violation of the

Robinson-Patman Act, 15 U.S.C. § 13 (R. 117, ¶6(2)); when

did the anti-trust claims accrue and the statute of limitations,

15 U.S.C. § 15b, commence to run (R. 117, ¶6(4)); and the issues

of damages resulting from the claimed anti-trust violations

(R. 117, ¶6(5) and (6)).

No allegation is made by appellants in their

complaint of violation of Section 3 of the Clayton Act,

15 U.S.C. § 14, nor is it stated to be in issue in the

Pre-Trial Order (R. 114-18). Appellants for the first

time refer to Section 3 of the Clayton Act in their

appeal brief; see appellants' brief, pages 9, 11, 12.

Upon entry of the Pre-Trial Order, the case was

transferred to Fairbanks (R. 118), where further proceedings

were conducted before Judge Plummer.

E. Appellants' Answers to Union Oil's Interrogatories

In order to define more precisely the scope of

appellants' anti-trust allegations in light of the Pre-

trial Order, interrogatories were submitted by appellee

(R. 139-46). Appellants' Answer to Union Oil's Inter-

rogatory No. 1 (R.147-49), executed by Robert Hoopes under oath, reduces appellants' claims to the following:

"The claim of plaintiffs is that Judge Rabinowitz in Cause No. 10230 in the Superior Court at Fairbanks by his Memorandum Decision, Findings of Fact, Conclusions of Law and Judgment, found and decided that Union Oil Company, by its various leases, leasebacks and discounts, kickbacks, secret guarantees, oral agreements made and extracted, and by a general course of action, established and maintained an exclusive requirements contract in connection with the service station on Cushman Street owned by plaintiffs and leased to Victor Hart and his successors, whereby the operators of the service station were required to, and did, over a long period of years, buy gasoline products exclusively from Union Oil Company and for a portion of that time, at least, received secret discounts and rebates from Union Oil in return for acknowledging and recognizing the exclusive requirements agreement, and that these actions, together with other actions on the part of Union Oil Company, conducted and carried on down to and including the fall of 1962, as alleged in plaintiffs' Complaint, constituted a contract in restraint of trade or commerce as a result of which plaintiffs' lessors were financially unable to continue to operate the service station, the same was closed and the plaintiffs were thereby damaged by loss of rental revenue and decrease in market value of the property. (emphasis added) (R.147-48)

* * *

"while the actions of Union Oil Company probably constituted both contract and conspiracy in restraint of trade and commerce, plaintiffs have elected not to join other parties as conspirators, but claim that the transactions constituted a contract in restraint of trade and commerce whereby plaintiffs were damaged." (R.148-49)

In their answer to Union Oil's Interrogatory No. 5

(R.140), appellants stated:

"The restraints of trade engaged in by Union Oil Company were directed against Victor Hart, his successors, his competitors and the public. Plaintiffs were not in the gasoline distribution business at the time but were lessors of Hart and his successors and were damaged by Union Oil's unlawful actions." (R.149)

Appellants also admitted they were never prevented from obtaining gasoline by any actions of Union Oil (Interrogatories 7 and 8, R.140-41; Answers 7 and 8, R.149; Court Order re Answers to 7 and 8, R.177).

F. Summary Judgment of the Court Below:

Union Oil moved for summary judgment (R.187) on appellants' anti-trust allegations as follows:

(a) Upon appellants' Sherman Act issues as defined in subparagraphs (1) and (3) of paragraph (6) of the Pre-Trial Order (R.116-17) on the grounds that appellants as lessors lacked standing to sue under either

Sections 1 or 2 of the Sherman Act for loss of rental income and reduced market value of their service station resulting from alleged Sherman Act violations of Union Oil against their lessee and for the further reason under subparagraph (3) of paragraph (6) of the Pre-Trial Order (R.117) relating to Section 2 of the Sherman Act that Union Oil could not possibly constitute a monopoly in restraint of trade in the Fairbanks or Alaska marketing areas.

(b) Upon appellants' Robinson-Patman Act claims as defined in subparagraph (2) of paragraph (6) of the Pre-Trial Order (R.117), on the ground that appellants were never purchasers from Union Oil against whom price discrimination was practiced (nor were they competitors of Union Oil who could be injured by any price discrimination by Union Oil).

(c) Upon the ground that the four year anti-trust statute of limitations, 15 U.S.C. § 15b, commenced to run in the year 1955, thereby barring the anti-trust allegations alleged in the Complaint which was not filed until 1963.

The court below granted Summary Judgment against

appellants and in favor of Union Oil upon appellants' First Cause of Action for anti-trust violations (R.205). The Summary Judgment eliminated all anti-trust claims of appellants --

"... for the reason that plaintiffs lacked standing to sue under Sections 1 and 2 of the Sherman Act (15 USCA §§1 and 2), for the reason that under the facts of this case they are not persons injured in their business or property by reason of anything forbidden in the anti-trust laws, within the meaning of 15 USCA §15; and on the further ground that plaintiffs lacked standing to sue under Section 2 of the Clayton Act as amended by Robinson-Patman Act (15 USCA §13)" (R.197-198).

Since this disposed of all of appellants' anti-trust allegations (R.198), the Court did not rule on Union Oil's contentions that the four-year anti-trust statute of limitations, 15 U.S.C., § 15b, barred appellants' anti-trust claims (R.188) and that Union Oil could not possibly constitute a monopoly under Section 2 of the Sherman Act (R.187).

III

QUESTIONS PRESENTED

The following questions are posed to this Court on appeal from the Summary Judgment and related orders of the District Court (R.197-202, 205-06):

1. Whether appellants as lessors of a service station, receiving a fixed monthly rental, have standing to sue under Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2, for loss of rent income and reduced market value of their leased service station resulting when the lessee-operator failed financially and abandoned the station allegedly due to the onerous provisions of an illegal requirements contract in restraint of trade between the lessee-operator and appellee Union Oil, the gasoline supplier.

2. Whether appellants as lessors of a service station state a cause of action for price discrimination under the Robinson-Patman Act, 15 U.S.C. Section 13, when they were not at any time relevant to this action operators of the service station and were never either purchasers of products from or competitors of the alleged discriminator, Union Oil.

3. Whether an action commenced January 18, 1963 under the anti-trust laws by a contract vendor and later lessor of a service station for damages arising out of an alleged contract in restraint of trade is barred by the four year anti-trust statute of limitations, 15 U.S.C., § 15b, when the last overt act in completing the alleged contract in restraint of trade occurred on December 21, 1955, more than seven years prior to the date of commencement of the action.

IV.

SUMMARY OF ARGUMENT

Appellants as lessors of a service station lack standing to sue under Sections 1 and 2 of the Sherman Act, 15 U.S.C., Sections 1 and 2, for damages resulting to them from an alleged requirements contract in restraint of trade between their lessee, operator of the station, and appellee Union Oil, the gasoline supplier, for the reason that their alleged injuries are too remote to be cognizable under the anti-trust laws.

Appellants as lessors or contract vendors of a service station lack standing to sue under the Robinson-

Patman Act, 15 U.S.C. Section 13, for alleged price discrimination involving their lessee or contract vendee and other purchasers of gasoline from appellee Union Oil for the reason that at no time relevant to this action were appellants either purchasers of products from Union Oil or competitors of Union Oil.

As an alternative ground for dismissal not ruled upon by the District Court, appellants' anti-trust allegations are barred by the four-year anti-trust statute of limitations, 15 U.S.C. Section 15b, because the last overt act pertaining to the contract in restraint of trade which forms the basis for their anti-trust claims occurred December 21, 1955, more than seven years before commencement of this litigation on January 18, 1963, or in any event, not later than January 18, 1959.

V.

ARGUMENT

- A. Appellants as lessors of a service station lack standing to sue under Sections 1 and 2 of the Sherman Act for damages resulting from an alleged contract in restraint of trade between their lessee, operator of the station, and Union Oil, the gasoline supplier, for the reason that their alleged injuries are too remote to be cognizable under the anti-trust laws.

Appellants' anti-trust damages are predicated upon the effects of the so-called requirements contract which they claim -

"... constituted a contract in restraint of trade or commerce as a result of which plaintiffs' lessors were financially unable to continue to operate the service station, the same was closed, and the plaintiffs were thereby damaged by loss of rental revenue and decrease in market value of the property." (R.147-48; see also, appellants' brief, p.14.)

Appellants concede that a conspiracy is not alleged which would include either Transfare or Hart as co-conspirators with Union for the purpose of injuring appellants (R.215, 139, 176). Nor is there any suggestion of such a conspiracy anywhere in appellants' lengthy allegations and from the pre-trial proceedings.

Accordingly, the Sherman Act issue on this appeal may be stated as follows: Whether appellants as lessors of

a service station, receiving a fixed monthly rental, have standing to sue under Sections 1 and 2 of the Sherman Act for loss of rent income and reduced market value of their leased service station resulting when the lessee-operator failed financially and abandoned the station allegedly due to the onerous provisions of an illegal requirements contract in restraint of trade between the lessee-operator and appellee Union Oil, the gasoline supplier.

There has been considerable discussion in the cases in recent years concerning the right of a party only indirectly injured to sue under the anti-trust laws. In the group of lessor-lessee and analogous cases which have considered this matter, no case has held that a lessor may recover for loss of rent or decrease in market value of his property resulting when the lessee has been the victim of anti-trust violations.

On the other hand, where the lessee has been a co-conspirator with others to injure the lessor, some, but not all, of the cases hold that the lessor is entitled to sue the lessee and his co-conspirators.

The first decision to give the lessor-lessee problem extended consideration is Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D.Pa., 1953), aff'd 211 F. 2d 405 (1954), cert. den. 348 U.S. 828, 99 L.Ed. 653, 75 S.Ct. 45 (1954). There, an action was brought by a non-operating motion picture theatre owner against a film producer and a distributor for conspiracy to restrain trade by denying first-run pictures to the lessee of plaintiff's theatre. The opinion of Judge Kirkpatrick does not clearly state whether the lessee was a conspirator or merely a victim of the conspiracy. Subsequent decisions appear to have construed it both ways. Judge Kirkpatrick concluded that the lessor was not a person "injured in his business or property", within the meaning of 15 U.S.C., Section 15, the anti-trust enforcement statute.

The Harrison decision was subsequently followed by the Third Circuit in Melrose Realty Co. v. Loew's Inc., 234 F. 2d 518 (3rd Cir.1956) in which the court declined to permit an action for conspiracy by a lessor theatre operator against the lessee.

Accord: Lieberthal v. North Country Lanes, Inc., 221 F. Supp. 685 (1963), aff'd on other grounds, 332 F. 2d 769 (2nd Cir. 1964).

The Harrison decision was distinguished in Steiner v. 20th Century Fox Film Corporation, 232 F.2d 190 (9th Cir., 1956). There, an action was brought by a lessor of a motion picture theater alleging a conspiracy between a producer, a distributor and a lessee to force the lessor to receive less than reasonable rent for his theater. In that opinion this court very clearly states the distinction between the situations where the lessor sues when the lessee is a victim of a conspiracy and when the lessee is a participant in a conspiracy against the lessor. Steiner involved the latter situation and this court concluded the lessor was entitled to sue. This court apparently construed Harrison to be a case where the lessee was a victim of a conspiracy, rather than a conspirator when it stated:

"In Harrison v. Paramount Pictures... there were no direct dealings between the plaintiff and defendant. Here the [lessor] asserts the [producer and distributor] conspired with the prime lessee to force the [lessor] to receive less than a reasonable rent."

In the Seventh Circuit the right of a lessor to sue was next considered at length in Congress Building Corp. v. Loew's, Inc., 246 F. 2d 587 (7th Cir., 1957). There, an

action was brought by a non-operating owner-lessor of a motion picture theatre alleging a conspiracy of the lessee, distributors and other exhibitors to monopolize the exhibition of motion pictures. Judge Swaim in his opinion meticulously analyzes the Harrison case, supra, on the assumption that Harrison was a case where the lessee was a conspirator and on that basis, declines to follow it.

The Opinion discusses much of the case law in this area and reconciles most of the decisions on the lessee-as-victim and lessee-as-conspirator distinction. While Judge Swaim's decision is unquestionably more favorable to appellants than some others, his opinion itself differentiates the present circumstances, when it states:

"It is also true that [there] ... may be grounds for distinction in cases where the lessee is also injured as a result of anti-trust violations, and cases where the lessee is a party to the anti-trust violations. For example, would the defendants be subject to actions, one by the lessor and one by the lessee. Suppose the lessee sues first and recovers, should the damages be apportioned between lessors and lessees and, if so, how? Another problem is that of settlements by one of the parties without the participation or consent of the other. ... None of these problems is present in the lessor situation where the

lessee is a party to the anti-trust violations, and may justify a different result." (p. 591).

It is conceded that Judge Swaim more broadly interpreted the scope of 15 U.S.C., Section 15, than had Judge Kirkpatrick in the Harrison case. Subsequent case discussion, however, has cast doubt on the validity of this broader interpretation even in the Seventh Circuit.

In Sandidge v. Rogers, 256 F. 2d 269 (7th Cir., 1958), a lessor of a quarry brought an action against a lessee and others for conspiracy in violation of the anti-trust laws. The lessor claimed that as part of the conspiracy the lessee halted production from the quarry which, in turn, reduced her rent income which was paid in part on a ton-royalty basis. Judge Hastings in a concurring opinion states at page 278 that he has "grave concern that the holding in the Congress case goes too far". But since the trial court in the Sandidge case had ruled against the defendants with respect to the right of the lessor to sue on the basis of Congress and no issue had been raised on appeal on this matter, Judge Hastings indicates that the matter was properly not considered in the majority opinion.

For further critical comment of Congress, see also Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F. 2d 383 (6th Cir., 1962), discussed below at page 27.

Erone Corporation v. Skouras Theatres Corp., 166 F. Supp. 621 (S.D.N.Y., 1957) also involved a lessee-conspirator and the plaintiff lessor was found to have standing to sue. But the court in so holding stated:

"... the Third Circuit has denied relief to a non-operating owner-lessor [citing Harrison and Melrose, supra] while the Ninth and Seventh Circuits have allowed the relief, at least if the lessee of the theatre is engaged in the conspiracy [citing Steiner and Congress, supra]."

On the other hand, in all of the decisions which have been decided where the lessee (or party in analogous circumstances) has been the victim of a conspiracy, the lessor (or the more remotely damaged party) has not been entitled to sue.

The Second Circuit considered this problem in Productive Inventions v. Trico Products, Corp. 224 F. 2d 678 (2nd Cir., 1955), cert. den. 350 U.S. 936, 100 L.Ed. 818, 76 S.Ct. 301(1956). There it was held that a licensor

of a patent is not entitled to sue under the anti-trust laws for loss of royalties where its licensee was a victim of an alleged anti-trust violation. In this holding the Second Circuit followed the earlier rulings from the Southern District of New York in lessee-"victim" cases in Folly Amusement Holding Corp. v. Randforce A. Corp., 32 F.Supp. 361 (S.D.N.Y., 1939); and Westmoreland Asbestos Co. v. John Mansville Corp., 30 F.Supp. 389 (S.D.N.Y., 1939), aff'd 113 F. 2d 114 (2nd Cir., 1940). In Productive Inventions, the court also approved of the Harrison decision.

The First Circuit in its decisions has followed the rule prohibiting the indirectly damaged party from suing. In Snowcrest Beverages v. Recipe Foods, 147 F. Supp. 907 (D.Mass., 1956), a supplier of a corporation which had been the victim of anti-trust violations was not permitted to recover, Judge Wyzanski there citing the Melrose case from the Third Circuit and the Productive Inventions case from the Second Circuit.

In Miley v. John Hancock Mutual Life Insurance Co., 148 F.Supp. 299 (D.Mass., 1957), aff'd 242 F. 2d 758 (1st

Cir., 1957) an insurance agent who had failed to receive commissions when his company failed to obtain a contract as a result of a conspiracy of the defendants was not entitled to recover, the court citing Melrose and Productive Inventions.

More recent cases in the Sixth Circuit have followed the same approach. In United Mine Workers of America v. Osborne Mining Co., 279 F. 2d 716 (6th Cir., 1960) it was held a coal sales agency could not recover damages for loss of sales commissions resulting when the business of a mining company it represented was destroyed by the unlawful activities of the defendants. While this case did not arise under the anti-trust laws the case law under discussion here was cited as controlling. The defendants cited Melrose, Harrison, Productive Inventions and Snowcrest while the plaintiff cited Congress and Steiner. The court distinguished the latter two cases by stating:

"In Congress Building and Steiner, the lessees were parties to the conspiracy. ... In the present case unlike the cited cases, [the mining company] was not a party to any conspiracy nor is there any claim that [it] committed any wrong of any kind against [plaintiff]." (pp. 728-29).

The same reasoning was applied by the Sixth Circuit in the recent case of Volasco Products Co. v. Lloyd A. Fry Roofing Company, 308 F. 2d 383 (6th Cir., 1962), cert. den. 372 U.S. 907, 9 L.Ed. 2d 717, 83 S.Ct. 721 (1963), where a supplier was not entitled to damages for loss of sales it otherwise would have made to its customer injured as a result of an anti-trust conspiracy. The plaintiff supplier relied upon Congress. The Sixth Circuit distinguished Congress on the ground that "the lessee was one of the co-conspirators" (page 394) and went on at pages 394-95 to criticize the suggestion in Congress of a broader interpretation of 15 U.S.C., Section 15.

In a recent case arising in the Second Circuit, Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 193 F.Supp. 401 (S.D.N.Y., 1961), a non-operating theatre owner-lessor was held not entitled to recover damages for reduced profits resulting from a conspiracy of producers and distributors directed against the lessee of plaintiff's theatre. The court cited Harrison, Melrose, John Mansville and Productive Inventions.

It should be noted that typically in these cases where lessors (or persons similarly situated) have sued parties conspiring against their lessees (or analogous persons), the plaintiffs have suffered losses they otherwise would not have incurred or failed to earn profits they would have earned but for the conspiracies complained of. Still, the complainants did not have standing to sue. Hence, the statement in the Harrison case, referred to in appellants' appeal brief at page 20:

"This is not a case in which by reason of the unlawful acts of the defendant a tenant has been forced to default in his rent. That situation need not be considered here."

is not the basis for differentiating the cases. In Harrison, the lessor had a percentage lease with a fixed minimum rent which was at all times received. Judge Kirkpatrick probably was merely emphasizing that the lessor there had not in his opinion really been damaged.

However, in all the other so-called "victim" cases the more remote complainants had been injured and still were not allowed to recover. Thus, the critical factor is not the extent of the loss but the remoteness of the lessor to

the party injuring the lessee-victim.

In the Ninth Circuit, the Steiner case, at most, supports the position that a lessor can sue where his lessee is a co-conspirator against him. With this position Union does not disagree. Any suggestion to the contrary from the Third Circuit in the Harrison and Melrose cases cited, supra, is probably incorrect. But the Steiner case does not support appellants' position, since appellants were in no way the object of a conspiracy or anti-trust violation. They by their own allegations were injured only indirectly as a result of the alleged injuries suffered by their lessee.

Any broad interpretation of 15 U.S.C., Section 15, which may be read into Judge Learned Hand's opinion in Vines v. General Outdoor Advertising Co., 171 F.2d 487 (2nd Cir., 1948), cited by appellants at page 20 of their appeal brief, must be read in light of his more recent opinion in Bookout v. Schine Chain Theatres, 253 F.2d 292 (2nd Cir., 1958), where it was held that a shareholder could not recover for damages to his shareholdings because of conduct which was an injury to the corporation. Judge Hand stated:

"As a new question it might perhaps be argued that if a shareholder, or a creditor, or any other person has been injured by a conspiracy under the anti-trust acts, a claim arises in his favor quite separate from any claim of the corporation. Be that as it may, this has not been the course of the decisions, which have distinguished between injuries arising directly from a conspiracy and those that are only 'indirectly' or 'incidentally' its result. Such was the situation in Loeb v. Eastman Kodak Co., supra, 183 F. 704, 709; Westmoreland Asbestos Co. v. John Mansville Co., supra, 30 F. Supp. 289, affirmed 113 F. 2d 114; Peter v. Western Newspaper Union, supra, 200 F.2d 867, 872, 873; Productive Inventions v. Trico Products Corp., 2nd Cir., 224 F. 2d 678; and Gerli v. Silk Association of America, supra, 36 F.2d 959." (p.295).

Appellants also quote from Karseal Corp. v. Richfield Oil Corp., 221 F. 2d 358 (9th Cir., 1955) at page 21 of their appeal brief as follows:

"The treble damage action is one for a tort and punitive and compensatory damages is the relief granted. 'Under the Clayton Act the right is not confined to persons in privacy with the wrongdoer, but is given to anyone who has suffered injury to his business or property by reason of the wrongful acts.' Clark Oil Co. v. Phillips Petroleum Co., supra, 148 F. 2d at pages 582-583. Vines v. General Outdoor Advertising Co., 2d Cir., 1948; 171 F. 2d 487, 491." (p. 363).

However, immediately following this quotation, the opinion in Karseal goes on:

"Turning now to the cases concerning 'target area' or proximate causation, the rule is that one who is incidentally injured by a violation of the anti-trust laws, -- the bystander who was hit but not aimed at -- cannot recover against the violator [citing cases].

In accordance with the foregoing rule, directness of injury was held lacking in suits by (a) shareholders, [citing cases]; (b) officers of corporations, [citing case]; (c) creditors [citing case]; and (d) Landlords [citing cases]." (p. 393).

The Karseal opinion then quoted from Conference of Studio Unions v. Lowe's, Inc., 193 F. 2d 51 (9th Cir., 1951):

"[A] Plaintiff ... must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise, he is not injured 'by reason' of anything forbidden in the anti-trust laws.

Such a construction is in accordance with the basic and underlying purpose of the anti-trust laws to preserve competition and to protect the consumer. Recovery of damages under the anti-trust laws is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm." (page 363).

The Conference case was subsequently cited approvingly in Snowcrest discussed, supra, at page 26, and the recent Volasco case discussed, supra, at page 28.

Although not cited by appellants, counsel for appellee feels obliged to call the Court's attention to its recent opinion in Harman v. Valley National Bank of California, 339 F. 2d 564 (9th Cir., 1964). There an action for treble damages was brought by an investment company which alleged that the defendants had induced the State Attorney General to place a Savings and Loan Association in receivership where the receiver had refused to honor the contractual obligations of the plaintiff, thereby causing plaintiff's injury. The Attorney General was alleged to have participated in the conspiracy which was alleged to be part of a larger scheme to restrain and monopolize the Arizona money market, all to the direct injury of the plaintiff. The Trial Court granted a motion to dismiss for failure to state a claim. While Judge Browning's opinion might be interpreted as narrowing the application of the Karseal "target-area" doctrine, this Court concluded:

"There is nothing in the allegations of the Complaint which would preclude proof that the alleged conspiracy was aimed, in part, directly at the refinancing arrangements between [plaintiff] and the Association."

The case was then remanded for further clarification of the vaguely alleged issues without a ruling on whether a claim was in fact stated with the following comment:

"It may be well to repeat, in the words of Judge Barnes, that a motion to dismiss is not 'the only effective procedural implement for the expeditious handling of legal controversies. Pre-trial conference; the discovery procedures; and motions for a more definite statement, judgment on the pleadings and summary judgment, all provide useful tools for the sifting of allegations and the determination of the legal sufficiency of an asserted claim short of trial. Rennie & Laughlin, Inc. v. Chrysler Corp., 242 F. 2d 208, 213 (9th Cir., 1957). See also Shull v. Pilot Life Ins. Co., 313 F. 2d 445, 447 (5th Cir., 1963)."

In the present case, lengthy pre-trial proceedings and delineation of the issues in the Pre-Trial Order preceded the Trial Court's entry of summary judgment.

Thus, cases arising in the Ninth Circuit do not support appellants' position that they as lessors are entitled to sue where their lessee was allegedly the victim of appellee's contract in restraint of trade. Nor do the cases arising in the other circuits support their position. All of the cases can be reconciled where the lessee is a

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victim of the anti-trust offense which, in turn, causes injury to the lessor. In this circumstance -- which is the circumstance of this case -- the lessor is not entitled to sue. The only conflict in the decisions arises in circumstances where the lessee is a participant in the anti-trust offense -- which is not the circumstance of this case.

Appellants in their appeal brief (pp.34, 37) cite and discuss Simpson v. Union Oil Co., 377 U.S. 13, 12 L.Ed. 2d 98, 84 S.Ct. 1051 (1964) reversing 311 F. 2d 764 (9th Cir., 1963) where the Supreme Court held, in an action by a service station lessee against the lessor Union Oil, that the use of a consignment agreement by Union Oil in the circumstances of that case was illegal under the anti-trust laws. Even assuming that the Simpson case would be somehow relevant if the operator of appellants' service station had been the plaintiff in this proceeding, it has no possible relevance where the plaintiffs were the nonoperating contract vendors or lessors of the station who were not parties to the alleged contract in restraint of trade.

Appellants also cite for the first time in their appeal brief (pp.11, 12) Section 3 of the Clayton Act, 15 U.S.C. Section 14, which prohibits exclusive dealing contracts which may substantially lessen competition or tend to create a monopoly. Since this statute was neither alleged nor ever cited in the pre-trial proceedings, appellants should not now be allowed to claim its application. But in any event, appellants have no better standing to sue under its provisions than under Sections 1 and 2 of the Sherman Act since the so-called exclusive requirements contract was between Union Oil and the station operators. Accordingly, the foregoing case discussion applies with equal force to any claim that Section 3 of the Clayton Act is applicable.

B. Appellants as lessors or contract vendors of a service station lack standing to sue under the Robinson-Patman Act, 15 U.S.C. §13, for alleged price discrimination between their lessee or contract vendee and other purchasers of gasoline from appellee Union Oil for the reasons that appellants at no time relevant to this case were either purchasers of products from Union Oil or competitors of Union Oil.

1. Appellants never purchased gasoline from Union Oil nor were they competitors of Union Oil.

In granting partial summary judgment the district court ruled that:

"... Plaintiffs lacked standing to sue under § 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C.A. §13)." (R.198; see also R.170-71).

Although the District Court in its order did not state the specific reasons for its conclusion, from the cases it cites and the earlier briefs and argument it is clear the bases for the Court's conclusion were that appellants were neither purchasers from Union Oil nor competitors of Union Oil.

Appellants concede they never were purchasers (R.215; Interrogatories 7 and 8, R.140-41, and appellants' Answers, R.149, 177). And nowhere in the record is there any suggestion that appellants were competitors of Union Oil. As mere lessors or contract vendors of the station to the actual operators it is patent that appellants could not possibly be competitors of Union Oil in the areas of producing, refining or marketing of petroleum products. (See appellants' Answer to Interrogatory No. 5, R.149). Curiously, appellants

claim Union Oil discriminated in price in favor of their lessee which, if true, should have financially strengthened, not weakened, their lessee (R.7-8, 147). The real thrust of appellants' price discrimination allegations is damage to the public interest, as a result of which, somehow, appellants consider themselves to have been injured.

2. To state a claim for price discrimination under the Robinson-Patman Act appellants must either have been purchasers from or competitors of Union Oil, the alleged discriminator.

In order to consider the several cases cited by appellants in support of their claim of price discrimination under Section 2(a)*, a brief analysis of the structure of that section is necessary.

*15 U.S.C. §13(a). To avoid confusion with 15 U.S.C. 13a, the codification of Section 3 of the Robinson-Patman Act, references here will be to the sections of the Clayton Act as amended by the Robinson-Patman Act.

The cases construing Section 2(a) normally relate to price discrimination which results in injury to competition at two different levels of competition: (1) competition with the seller who grants the discrimination (primary line competition), and (2) competition with the seller's customer purchasing at a lower price (secondary line competition).*

The typical situation involving competing sellers is local price cutting by a large seller having wide distribution for the purpose of injuring a competing local competitor.

The typical situation involving competing purchasers is the granting of a price advantage by a common seller to one purchaser but not to another purchaser. For a general discussion of the structure of Section 2(a) and the different levels of competition to which it applies, see Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act, June, 1959 Joint Committee on Continuing Legal Education, American Law Institute, Pages 40-50; Thumann, "Territorial Discrimination, Robinson-Patman, and a Rule of Reasonable Probability", 8 U.C.L.A. L. Rev. 363, 365-66. See also, Federal Trade Com.

*There is a third level, competition with a customer of a customer purchasing at a lower price, which does not apply to the present case.

v. Annheuser-Busch, 363 U.S. 536, 542-45, 4 L. Ed. 2d 1385, 1389-91; Van Camp & Sons Co. v. American Can Co., 278 U.S. 245, 73 L. Ed. 311 (1929).

All of the cases which appellants have cited to support their Section 2(a) claims either present fact situations involving injury to competition at the level of competing sellers or simply are not relevant in a discussion of Section 2(a). Obviously, where a seller has discriminated in price between different purchasers and has thereby injured a competitor of the seller, the competitor need not himself be a purchaser to come within the scope of Section 2(a).

The case of Moore v. Meads Fine Bread Co., 348 U.S. 115, 99 L. Ed. 145 (1955), cited and discussed at Page 32 of appellants' brief, is representative of this type of primary-line competitive injury. In the Moore case an interstate baking corporation and a local baker were engaged in competition for a local market. The interstate baker sharply cut its price in that local market only and kept its prices high elsewhere and thereby forced the local baker out of business. This kind of competition by the large interstate concern, involving the financing of its local price war by profits made elsewhere, is what prompted the words of Justice

Douglas quoted by appellants:

"This type of price cutting was held to be 'foreign to any legitimate commercial competition' even prior to the Robinson-Patman Act."

Karseal Corporation v. Richfield Oil Corporation, 221 F.2d 358 (9th Cir., 1955), discussed at page 30 of appellants' brief, does not involved Section 2(a), but Section 3 of the Clayton Act (15 U.S.C. Sec. 14) which pertains to exclusive dealing arrangements, and Sections 1 and 2 of the Sherman Act. It also again presents the circumstance of primary-level competition between competing sellers and the lengthy quotes from the court's opinion must be understood in that context. The other Ninth Circuit case cited by plaintiff, Steiner v. Twentieth Century Fox Film Corporation, 232 F.2d 190 (9th Cir., 1956) was limited to Sections 1 and 2 of the Sherman Act and is discussed supra at page 22. Appellee sees no relevance of Steiner to Robinson-Patman allegations.

On the other hand, the cases considering the standing necessary to sue where secondary-level competition is involved - the circumstance of the operators of the service station here in issue - clearly require that the complainant must be a purchaser who has been injured by failure to

receive as low a price as his competitor has received from the same seller.

In a case arising in the Ninth Circuit, Bolick-Gillman Company v. Continental Baking Company, 206 F. Supp. 151 (D.Nev., 1961), a wholesale distributor of bread for an Arizona baker sued a Utah baker under Section 2(a) on the grounds that the Utah baker sold to a distributor competing with the plaintiff at a lower price than it sold to other distributors elsewhere, thereby allegedly injuring plaintiff. The Nevada District Court in a scholarly opinion held that Section 2(a) does not allow a cause of action where the complaining party was neither in competition with the defendant baker nor a purchaser from the defendant. The Court stated:

"The question is whether plaintiff is within the scope of those statutes which make certain types of conduct illegal and give to certain persons the right to recover damages which result from such conduct. We note, initially, that although Section 4 of the Clayton Act states, in relevant part, that 'any person who shall be injured * * * may sue,' the Courts have not seen fit to read that provision literally. Thus, even though injured by reason of violation of the antitrust laws, certain persons have been held unable to maintain private damage suits. Among such persons are shareholders, officers of corporations, creditors and landlords. See Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir., 1955)...."

"[W]e are satisfied... that a plaintiff, when suing to enforce the Act on a theory of injury to primary-line competition, must allege and prove that it was in competition with the defendant. We are aware of no cases, and plaintiff has cited none, which have allowed a person to sue on a theory of injury to primary-line competition who was not, himself, a competitor of the alleged wrongdoer. This is not to say, however, that a person who is not a competitor of the grantor of a discriminatory price has no recourse against the wrongdoer. Another purpose of the Act is to protect so-called 'secondary-line competition.' *George Van Camp & Sons Co., v. American Can Co.*, 278 U.S. 245, 49 S. Ct. 112, 73 L. Ed. 31 (1929). Here, we are typically dealing with a case in which one of two buyers of the same seller is injured in the competition for the resale of goods because the other buyer obtains his goods from the seller at a more favorable price. *Thumann*, op.cit.supra, at 366. We have no doubt but that the essence of a secondary-line case is the injury to competing buyers from the same seller. See *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 45 et seq., 68 S. Ct. 822, 92 L. Ed. 1196 (1948), where there are repeated phrases such as 'competitive injury between a seller's customers.' Accordingly, we are satisfied that a plaintiff, when suing to enforce the act on a theory of injury to secondary-line competition, must allege and show that he was a purchaser from the defendant and that he was in competition with one or all of the favored dealers. See *Youngson v. Tidewater Oil Co.*, 166 F. Supp. 146, 147 (D. Ore., 1958); *Alexander v. Texas Co.*, 149 F. Supp. 37, 41 (W.D. La., 1957); *Baim & Blank, Inc. v. Philco Corp.*, 148 F. Supp. 541, 543 (E.D.N.Y., 1957). Compare *Klein v. Lionel Corp.*, 237 F. 2d 13, 14-15 (3rd Cir., 1956).

"[W]e are of the opinion that, in a primary-line case, only a competitor of the defendant is entitled to the windfall of treble damages, and that, in a secondary-line case, only a

customer of the defendant may bring suit. (pp. 152-54, emphasis added.)*

In Klein v. Lionel Corp., 237 F.2d 13 (3rd Cir., 1956)

summary judgment of the trial court was affirmed where a retailer complained that the price he paid to his middleman supplier was higher than other large retailers paid who purchased directly from the manufacturer. The Third Circuit stated:

"...an individual can have no cause of action under Section 2(a) of the Clayton Act unless he is an actual purchaser from the person charged with the discrimination."(pp. 14-15)

In Ben B. Schwartz & Sons, Inc., v. Sunkist Growers, Inc., 203 F. Supp. 92 (E.D. Mich. S.D., 1962), a wholesaler claimed damages for alleged discrimination under Section 2(e) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C., Sec. 13(e)), by a marketing association for its

* The Plaintiff in Bolick-Gillman had earlier appealed from an unpublished opinion dismissing the complaint which had alleged violation of Section 1 of the Sherman Act and Section 2(a) of the Clayton Act. The Ninth Circuit reversed in a per curiam decision, 278 F. 2d 649 (9th Cir., 1960). Upon remand, only Section 2(a) was in issue and a renewed motion to dismiss was granted. The effect of the reversal of the original dismissal is discussed by Judge Ross at footnote 1, page 153 of his opinion, where he makes it clear that the issue of the Plaintiff's standing to sue under Section 2(a) had not been decided by the Ninth Circuit in the earlier appeal.

refusal to provide equivalent services and facilities available to other large purchasers and for its refusal to sell directly to the plaintiff. The phrasing of Sections 2(a) and 2(e) are strikingly similar. Section 2(a) provides:

"It shall be unlawful for any person ... to discriminate in price between different purchasers of commodities..."

Section 2(e) provides:

"It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity ... by furnishing ... any services or facilities ...not accorded to all purchasers on proportionately equal terms."

Judge Thornton held that the alleged violation did not fall within the scope of Section 2(e) and stated:

"How can plaintiffs rely upon the manner of discrimination for their cause of action without preliminarily establishing that they are purchasers? The testimony not only fails to establish that plaintiffs are purchasers from defendant but establishes positively that they do not purchase from defendant. That is one of their complaints - that defendant refuses to sell to them. Chief Judge Biggs states unequivocally that one must be a direct purchaser to be entitled to protection under the Act. *Klein v. Lionel Corp.*, 3 Cir., 1956, 237 F.2d 13. This seems to us to be in accord with the plain language of this section of the Act..."

Because of the similarity between Sections 2(a) and 2(e)

Judge Thornton's reasoning applies with equal force to Section 2(a).

See also Baim & Blank, Inc. v. Philco Corporation,
48 F. Supp. 541 (E.D.N.Y. 1957), where secondary-line
competition was in issue and the Court stated:

"Plaintiff does not dispute one cannot
have a cause of action for a violation under
Section 2(a) of the Clayton Act, * * * unless
one is an actual purchaser from the person
charged with the discrimination. See Klein
v. Lionel Corp. * * *." (Page 543, emphasis
added).

In Youngson v. Tidewater Oil Company, 166, F.
Supp. 146 (D. Ore., 1958), cited in Bolick-Gillman,
supra, and arising in the District of Oregon, an action
was brought under Section 2(a) by a service station
operator against a gasoline distributor alleging the
distributor had discriminated in sales of gasoline
to the operator. Judge Solomon granted a motion to
dismiss where the operator failed to allege he actually
lost business as a result of such discrimination. The
Court stated:

"In my view, to come within the reach of
the provisions of the Robinson-Patman Act, one

"must show lost profits resulting from the necessity of meeting the prices of favored competitors or lost sales to such favored competitors, due to one's inability to meet their prices, or both.

Thus, in Judge Solomon's view, it was essential for the plaintiff to allege he had been injured as a result of discriminatory sales to him, not to some third party. See also, Alexander v. Texas Company, 149 F. Supp. 37, 40-41, (W.D. La., 1957) to the same effect.

Since appellants were neither purchasers from Union Oil nor its competitors, the District Court properly dismissed their Robinson-Patman allegations of discrimination by Union Oil.

C. Appellants' Anti-Trust Allegations are
barred by the four year anti-trust statute
of limitations, 15 U.S.C., Section 15b, be-
cause the last overt act pertaining to the
contract in restraint of trade occurred De-
cember 21, 1955, more than seven years before
commencement of this litigation on January
18, 1963.

The lease-leaseback between Victor Hart and Union Oil and the related financing arrangements which Judge Rabinowitz concluded constituted a requirements contract (R.35-6, 79), were executed December 21, 1955 (R.6-7, 31-2).^{*} Hart's obligations were subsequently assumed by his successor station operators culminating in the alleged financial failure of the operator Transfare, Inc. (R.12; appellants' brief, p. 14). While appellants now attempt to establish that their injuries occurred much later (appellants' brief, p. 19), all of their claims arise from and are a result of the December 21, 1955, contracts.

Even assuming Union Oil's consent to Hart's sub-lease to Schroeder and Wisel of February 10, 1956, (R.12, 34, 77) or its subsequent consent to operation by Transfare Inc. (R.34), or the May 18, 1958 quitclaim of the premises back to appellants by Hart and Transfare (34, 77) could be "overt acts" involving Union Oil, the

^{*} There were a few supplemental documents executed shortly after December 21, 1955 between Hart and the Bank (R.76). The chattel mortgage to the bank from Hart was

four-year statute of limitations would still bar appellants' claims since their action was not commenced until January 13, 1963, (R.1) more than four years later.

15 U.S.C., Section 15b provides:

"Any action to enforce any cause of action under [the anti-trust laws] shall be forever barred unless commenced within four years."

This court has stated with precision when the statute of limitations commences to run on an anti-trust claim. In Steiner v. 20th Century-Fox Film Corporation, 232 F. 2d 190 (9th Cir., 1956), discussed, supra, with regard to the merits of appellants' Sherman Act claims, the issue of when the statute of limitations commenced to run was discussed at length. There a theater lessee was alleged to have conspired with others against a lessor to monopolize the exhibition of motion pictures. This court stated:

"The question: When does the statute of limitations begin to run? points to the first problem which must be here resolved. Appellant contends that where damages are in their nature continuing the statute runs from the date of the last injury. Under this view the statute of limitations would not run until all injury to a claimant had ceased. We must disagree. In a civil conspiracy, the statute of limitations runs from the commission of the last overt act alleged to have caused damage. [Citing cases].

"Appellant has interpreted the following language in Suckow Borax Mines Consol. v. Borax Consolidated, 135 F. 2d at page 200:

"'* * * private civil antitrust actions are founded, not upon the mere existence of a conspiracy, but upon injuries which result from the commission of forbidden 'overt acts' by the conspirators, * * *.'"

to mean that the statute of limitations runs not from the overt act, but from the damages sustained. This quotation from Suckow Borax Mines Consol. v. Borax Consolidated, supra, is similar to statements in Foster & Kleiser Co. v. Special Site Sign Co., supra, 85 F.2d at page 751, and Burnham Chemical Co. v. Borax Consolidated, supra, 170 F.2d at page 577. These statements are in turn based upon language in Bluefields S. S. Co. v. United Fruit Co., supra, 243 F. at page 20, to the effect that the statute of limitations begins to run when the cause of action arises, and the cause of action arises when damage is sustained. We do not construe these cases to substantiate appellant's contention. These decisions merely hold that in order to start the running of the statute of limitations there must be damage occasioned by an overt act. In a continuing conspiracy causing continuing damage without further overt acts, the statute of limitations runs, as we have noted, from the time the blow which caused the damage was struck. Any further internal injury affects the problem of how much should be claimed in damages, not the problem of when the statute of limitations commences to run. Otherwise, in a continuing conspiracy, the cause of action of an injured party would never fully develop, nor would there be any limitation upon the right of action, and the beneficent purpose of the statute to delimit the right to sue would be defeated." [Citing cases]. (pp.194-95).

The lessee-defendant contended the statute of limitations began to run upon execution of the lease in which event the action would have been barred while the lessor-plaintiff claimed the statute of limitations did not begin to run until the theater was closed by the lessee-conspirator prior to the expiration of the term of the lease on the theory the closure was an overt act in furtherance of the conspiracy.

This court concluded that whether the closure of the theater was part of the conspiracy had not been determined. The case was accordingly remanded for determination of this fact. But the court made it clear that any damages recoverable would be limited to injury from the closure of the theater, since all earlier damages were barred by the statute of limitations.

The present facts have a substantial similarity to those of the Steiner case with the critical difference that in Steiner the lessee who closed the theater was a conspirator and the closure could be found to be an overt act of the conspiracy, whereas here neither the lessee-operator Transfare who ultimately abandoned the station, nor the preceding operators were part of a conspiracy.

Hence, here, the last overt act by Union, the alleged wrongdoer, which caused appellants' injuries could only be the execution of the lease-leaseback, or requirements contract, with Victor Hart on December 21, 1955, more than seven years prior to commencement of the action.

Accord: Suckow Borax Mines Consolidated v.

Borax Consolidated, 185 F. 2d 196 (9th Cir., 1950)

cert. den., 340 U.S. 943, 71 S.Ct. 506, 95 L.Ed. 680

(1951), cited and discussed in the Steiner opinion;

Momand v. Universal Film Exchanges, 172 F. 2d 37 (1948)

cert. den., 336 U.S. 967, 69 S.Ct. 939, 93 L.Ed. 1118

(1949); and Farbenfabriken Bayer, A.G. v. Sterling Drug.,

153 F.Supp. 589, (D.N.J. 1957) aff'd on other grounds

307 F. 2d 210 (3rd Cir., 1962), cert. den., 372 U.S. 929,

83 S.Ct. 872, 9 L.Ed. 2d 733 (1963). In the latter case,

the district court stated:

"A civil action for conspiracy is essentially an action in tort. It is well established that such an action cannot be maintained in the absence of: first, the overt act of one or more of the conspirators in the furtherance of the conspiracy; and second, the consequential damage to the rights of another of which the overt act is the proximate cause. The

gravamen of the action lies not in the conspiracy but in the overt act. A cause of action accrues upon the commission of an overt act followed by damage to another of which the overt act is the proximate cause. The statute of limitations runs from the commission of the last overt act alleged to have caused damage. *Park-in Theatres v. Paramount-Richards Theatres*, D. C., 90 F. Supp. 727, affirmed 3 Cir., 185 F.2d 407, certiorari denied 341 U.S. 950, 71 S. Ct. 1017, 95 L.Ed. 1373; see also: *Northern Kentucky Tel. Co. v. Southern Bell T. & T. Co.*, 6 Cir., 73 F.2d 333, 335, 97 A.L.R. 133, certiorari denied 294 U.S. 719, 55 S. Ct. 546, 79 L.Ed. 1251; *Steiner v. 20th Century-Fox Film Corporation*, 9 Cir., 232 F.2d 190, 194-195. The victim of the conspiracy may continue to suffer damage long after the last overt act has been committed, but, if he is to preserve his cause of action, he must commence suit within the period defined by the applicable statute of limitations. *Ibid.*" (pp. 592-3).

The Court then quoted at length from the opinion of this court in the Steiner case.

Since the gravamen of appellants' claims is the 1955 requirements contract, their subsequent injuries are not now actionable. For this additional, alternative reason, the partial summary judgment of the court below should be affirmed.

VI.

CONCLUSION

Based upon the allegations of a contract in restraint of trade and price-fixing arising out of the lease-leaseback or requirements contract of December 21, 1955, between Victor Hart and Union Oil, one could perhaps conclude that had Victor Hart or his successors been the plaintiffs in this action their complaints would have withstood a motion for summary judgment.

But neither Victor Hart nor the successor station operators are parties to this action or any other action against Union Oil, nor are they in any way alleged to have been participating conspirators. If anti-trust allegations were to have been timely made, Hart and his successor station operators should have made such allegations, not appellants.

While the summary judgment procedure should surely be used with caution, in the present case pre-trial discovery proceedings and pre-trial conferences extending

over more than two years before Judge Hodge and Judge Plummer were used liberally in order to define the issues prior to the entry of summary judgment.

It is respectfully submitted that the District Court properly dismissed appellants' Sherman Act and Robinson-Patman Act claims because of their lack of standing to sue under either Act. In addition, appellants' anti-trust claims are barred by the four-year anti-trust statute of limitations and for this alternative reason the dismissal of appellants' anti-trust claims by the District Court should be affirmed.

DATED at Seattle, Washington, September 17, 1965.

LITTLE, GANDY, STEPHAN, PALMER
& SLEMMONS

BY: *Herbert S. Little*

Herbert S. Little

BY: *Richard W. Hemstad*

Richard W. Hemstad

McNEALY & MERDES

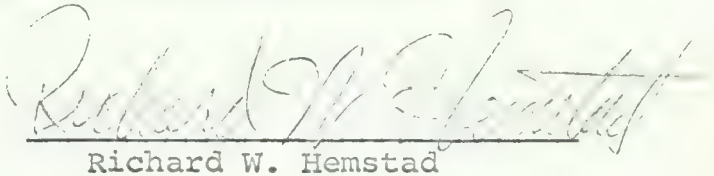
BY: *Edward A. Merdes*

Edward A. Merdes
Edward A. Merdes

VII.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


Richard W. Hemstad

APPENDIX OF STATUTES

15 U.S.C. Sec. 1 (Sherman Act, Sec. 1)

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282."

15 U.S.C. Sec. 2 (Sherman Act, Sec. 2)

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282."

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: and provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or

merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

* * *

"(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

15 U.S.C. Sec. 14 (Clayton Act, Sec. 3)

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or

discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731."

15 U.S.C. Sec. 15 (Clayton Act, Sec. 4)

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731."

15 U.S.C. Sec. 15b

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections. Oct. 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283."

NO. 20185

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERT HOOPES and RAE S.)
OPES,)
)
Appellants,)
)
vs.)
)
ION OIL COMPANY OF)
LIFORNIA, a corporation)
)
Appellee.)
)

REPLY BRIEF

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FRANK H. SCHMID, CLERK

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REPLY BRIEF

Preface

This Reply Brief will be limited to comment on a few of the points raised or ignored in appellee's Brief. No effort will be made to re-argue matters set forth in Appellant's Opening Brief. Positions taken there are not waived but relied on.

Remoteness of Injury

On Page 17, in its Summary of Argument, appellee asserts that the injuries suffered by appellants are too remote to be cognizable under the antitrust laws. We disagree, but nevertheless feel that appellees for the first time have placed the matter in proper legal perspective.

The question is not whether appellants were lessors, contract vendors, or service station operators, but whether or not the unlawful actions of appellees were the proximate cause of appellants' injuries.

Appellee, as is customary in antitrust cases, seeks to set this case off from others by razor-fine distinctions. The argument made is that the lessor can recover only when it joins the lessee as a defendant or conspirator. It need not keep the lessee in the case but only have him in at the beginning. This in essence is the argument advanced on Page 20 of appellee's Brief. It is on this basis that appellee seeks to avoid

Steiner v. Twentieth Century Fox Film Corporation (9th Cir. 1956)
32 F. 2d 190, cited and quoted from on Pages 13, 14 and 15 of
our opening Brief. In Steiner the lessee was an original defen-
dant, but the case was dismissed as to him.

Appellee, on Page 22 of its Brief, in effect urges this
Court to depart from the doctrine of Steiner in favor of the
much criticized and sometimes repudiated holding in Harrison
v. Paramount Pictures, Inc., 115 F. Supp. 312, affirmed 211
F. 2d 405. Even there the Court pointed out on Page 317 that
the unlawful acts had not forced the tenant to default on the
rent, which at all times had been paid in full; further, that
the plaintiff and defendants there had no direct business deal-
ings. These statements alone make Harrison inapplicable here.

On Page 30 of its Brief, appellee states that --

"Appellants were in no way the object of
a conspiracy or antitrust violation. They,
by their own allegations, were injured
only indirectly as the result of the al-
leged injury suffered by their lessee."

The statement is inapplicable. Perhaps appellants
personally were not the object of the antitrust violation, but
their property was. The injury was to appellants' property, and
it was direct. It was appellants' property which was the very
subject matter of the involved transactions which Judge
Rabinowitz held to constitute an exclusive requirements contract.
It was appellants' property which was the subject of the lease
and the lease-backs. The secret rebates and secret guarantees
had to do with petroleum products sold on the property and
payments made to the bank toward the purchase of it. The
suit which was heard before Judge Rabinowitz was directed

at the property and brought for the purpose of enforcing the illegal requirements contract. It was the acts of appellee, directed to the property, which forced Transfare, Inc. to vacate the property and which made it impossible for appellants to lease the property and diminished its sale value.. Appellants are not "the bystander who was hit but not aimed at" mentioned in Karseal Corp. v. Richfield Oil Corp., 221 F. 2d 858 (9th Cir., 1955), quoted by appellee on Page 32 of its Brief. These injuries were inflicted directly on appellants' property. Appellees cannot escape liability simply by contending that Transfare, Inc., the one-time lessee, was also injured.

Section 3 of Clayton Act

Under II,D, on Page 11 of its Brief, appellee attempts to avoid the impact of Section 3 of the Clayton Act, 15 USCA, Section 14, by asserting that no allegation of violation of Section 3 is found in the Complaint nor stated to be an issue in the Pre-Trial Order. The record does not sustain appellee. Judge Hodge, by Section 8 of his Pre-Trial Order (R.118), granted appellants leave to amend --

"to further clarify their position with respect to violation of the antitrust laws relied upon."

Appellants amended in accordance with the leave granted (R.119) and alleged violation of --

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"the antitrust laws of the United States as same are defined in Section 1 of the Clayton Act, Title 15, Section 12, USCA. . . ."

Section 15 of the Complaint (R.10) pleads facts establishing the violation. Nor did appellants at any time abandon their claim as to violation of Section 3 of the Clayton Act; neither did appellees ever challenge the sufficiency of the Complaint in that respect or make any mention of Section 3 in its various motions for summary judgment. The Motion for Partial Summary Judgment and for Supplementary Pre-trial Order Further Limiting Issues" (R.187) was limited to Sections 1 and 2 of the Sherman Act (R.187) and Section 2 of the Clayton Act (R.188). Judge Plummer did not grant the motion as made, but by "Memorandum to Counsel and Order" (R.197) found that appellants lacked standing to sue under Sections 1 and 2 of the Sherman Act or Section 2 of the Clayton Act and --

"that in so holding all antitrust claims will be eliminated." (R.198)

Appellants, believing the holding to be in error, have prosecuted this appeal.

Statute of Limitations

Triple damage actions are granted by 15 USCA, Section 15, being Section 4 of the Clayton Act, to "any person injured in his business or property," and the recovery allowed is "threefold damages by him sustained." Under appellee's theory, the action was barred before it arose. Appellee

could have the four-year statute commence to run on December 21, 1955. But how could the statute commence to run until the right of action had accrued? What action could appellants have brought against appellee on December 21, 1955? They had suffered no damage to business or property. This is not an action by the United States brought in the public interest. It is an action based on injury suffered by appellants and could not arise until appellants were injured. On December 21, 1955, and for years thereafter, appellants were receiving payments under their contract to sell the service station to Hart. Hart's assignees eventually abandoned the contract and reclaimed the property to appellants, who retained all payments previously made. Appellants leased the service station to Transfare, Inc. and received rental payments until April 12, 1961, when, by reason of the unlawful acts of appellee, Transfare, Inc. discontinued the rental payments and vacated the property. At this point the impact of the violation was felt by appellants. They lost the rental and the value of the property was depressed by reason of the action of appellee.

Nor do the authorities cited by appellee reach a different conclusion. In Steiner v. Twentieth Century Fox Film Corporation (9th Cir., 1956), 232 F. 2d 190, cited and quoted from on Pages 49 and 50 of appellee's Brief, the Court, in commenting on earlier cases, said --

"Those decisions merely hold that
in order to start the running of



the statute of limitations, there must be damages occasioned by an overt act."

Again, on Page 52 of its Brief, appellee quotes from Grubenfabriken Bayer, A.G v. Sterling Drug, 153 F. Supp. 589 (D.C.N.J. 1957), where the Court points out that the statute commences to run when the action accrues, and that the action accrues when two separate events occur --

"first, the overt act of one or more of the conspirators in the furtherance of the conspiracy;"

and

"second, the consequential damage to the rights of another of which the overt act is the proximate cause."

Furthermore, this is not a conspiracy case. The basis of the action is a contract in restraint of trade, whereby appellee successfully attempted to monopolize and did monopolize. It is properly summarized in appellant's answer to Union 1 Interrogatory No. 1 (R.147-149), which in turn is quoted on pages 12 and 13 of appellee's Brief.

It is not the written agreement of December 21, 1955, standing alone which constitutes the violation, but such agreement together with various leases, lease-backs, discounts, secret guarantees, oral agreements made and extracted, and the general course of action followed by appellee which Judge Rubinowitz found to constitute the exclusive requirements contract of long duration which we contend violated the antitrust laws. The written agreement of December 21, 1955, was the

beginning and not the final consummation of the illegal arrangement.

Supreme Court

As pointed out, beginning on Page 31 of appellants' brief, the rule narrowly restricting the right to sue for violation of the antitrust laws is not supported by the Supreme Court. Safeway Stores v. Vance (1957) 355 US 389, 78 S.Ct. 358, 99 L. ed. 2d 350, and Nashville Milk Company v. Carnation Company (1958) 355 US 373, 78 S.Ct. 352, 99 L. ed. 340, cited on Page 32, are ignored by appellee, and Moore v. Mead's Fine Bread Company (1954), 348 US 115, 75 S.Ct. 148, 99 L. ed. 145, is given passing comment on another point.

We submit that when Harrison, supra, and the authorities cited by appellee, are considered in the light of the recent Supreme Court pronouncements, the contention advanced by appellee cannot be sustained.

Summary Judgment for Appellants

Appellant, in its opening Brief, pointed out, beginning on Page 33, that on the basis of the recent decrees in Simpson v. Union Oil Co. of Cal., 377 US 13, 84 S.Ct. 1051, 99 L. ed. 2d 98, appellants are entitled to summary judgment on the issue of liability. This point is also ignored by appellee.

Dated October 8th, 1965.

Respectfully submitted,



W.C. ARNOLD, Attorney for Appel-
lants

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of
his Brief I have examined Rules 18 and 19 of the United
States Court of Appeals for the Ninth Circuit, and that, in
my opinion, the foregoing Brief is in full compliance with
those rules.



W.C. ARNOLD, Attorney for Appel-
lants



NO. 20185

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RT HOOPES and RAL S.)
ES,)
)
Appellants,)
)
vs.)
)
N OIL COMPANY OF CALIFORNIA,)
orporation,)
)
Appellee.)
)

BRIEF OF APPELLANTS

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U.S. COURT OF APPEALS

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E: Throughout this Brief transcript references apply to Vol.
of the transcript unless otherwise indicated.]

JURISDICTION

By the first cause of action set forth in their
Complaint (TR 1-18-119) Appellants seek threefold damages for
violation of the Anti-Trust laws as the same are defined in
Section 1 of the Clayton Act, Title 15, Sec. 12, USCA (TR 119)
Jurisdiction was vested in the District Court by Section
15 of the Clayton Act, Title 15, Section 15 USCA. The juris-
diction of the Court to review the Judgment below was granted
by Title 28, Section 1291 USCA. The second and third causes
of action set forth in the Complaint are not brought under
review by this appeal. Section 1 of the Complaint was
denied (TR. 119).

STATEMENT OF THE CASE

The controversy arises from transactions having to do with a service station for the distribution of gasoline and related products located at Fairbanks, Alaska, and owned by appellants Robert Hoopes and his wife, Rae S. Hoopes, and operated or leased by them to service station operators who, in agreement with Appellee, purchased their requirements exclusively from Appellee.

During the course of discovery proceedings Appellee objected (TR 126) to answering interrogatories respecting the existence or non-existence of agreements with its service station operators (TR 122-123) providing for rebates or discounts from posted prices to such operators who purchased their requirements exclusively from Appellee. The basis of objection was that the interrogatories involved alleged violation of the Robinson-Patman Act and appellants were not aggrieved or had no standing to sue for such violation. (TR 126-217). In aid of its objection, Appellee moved for partial summary judgment (TR 187) on the ground that Appellants lacked standing to sue and that Appellee could "not possibly" constitute a monopoly in violation of the Sherman Act (TR. 187), and further that the action was barred by the five-year Statute of Limitations. The trial court (TR 197) denied summary judgment on the ground that Appellants lacked standing to sue for the reason that they were not persons



ured in their business or property by reason of anything
bidden in the Anti-Trust laws. (TR. 197). No evidence was
en and the facts pertinent to the trial court's decision
the Motion for Summary Judgment are found in the plead-
s, exhibits, affidavits and interrogatories of record.

COMPLAINT

Appellants by their Complaint allege that Appellee
the largest or second largest factor in the sale, market-
and distribution of petroleum products in the Fairbanks
Metropolitan Area (TR. 3) and in Alaska as a whole (TR. 5)
that the Fairbanks Metropolitan Area, as a result of
ation and limited transportation is an economic and
petitive marketing region with respect to petroleum
ducts, separate and distinct from other parts of Alaska
4) and that Alaska itself is a similar separate and
inct region (TR. 5). These allegations are substantially
tted by paragraphs V, VI, VII and VIII of Appellee's
ver to Amended Complaint (TR 133-134) and the allegations
substantiated by defendant's Exhibits A & B (TR 219-220)
ing gasoline sales in millions of gallons in Alaska
in the Fairbanks area, together with comparative sales
Standard Oil Company and Texaco (TR. 4 of Vol. III), its
competitors. It is further alleged (TR. 9-10) that
llee by a series of transactions herein generally des-
ed, and more specifically set forth in paragraphs 10, 11,



13, 14 and 15 of Appellants' Complaint (TR. 6-9),
into effect an over-all arrangement and plan which
considered together with the dominant marketing pos-
on of Appellee was intended to and did foreclose or
sibly foreclose competition in a substantial line of
merce throughout an area of competition, and constituted
exclusive requirements contract of long duration in
straint of trade and a monopolization or an attempt to
opolize trade and commerce and a discrimination in prices
rged and a contract or agreement for the sale of gasoline
ducts on condition that the purchaser should obtain all of
requirements from Appellee and not use or deal in the
odities of its competitors, all in violation of the
-Trust laws of the United States.

Appellants in paragraph 24 (TR. 14), 25 (TR. 15), 26
15), 27 (TR. 16) and 28 (TR. 17), allege that by reason
litigation commenced by Appellee in the State Court at Fair-
s more fully discussed supra and the claim of Appellee
right of possession of the service station, threats of
inued litigation and demands that Appellee's products be
d exclusively on the premises by lessees or purchasers, made
a during and after litigation and continuing until the comm-
ment of this suit, Transfare, Inc., the service station oper-
became financially involved and vacated the service station
it was impossible, by reason of the acts of Appellee for

ellants to sell or lease the service station and that
e remained idle. Appellants allege (TR. 17) they were
aged by the wrongful or unlawful actions of Appellee in
lation of the anti-trust laws and are entitled to three-
d damages.

CASE IN THE STATE COURT

As previously set forth, Appellee brought action
inst Appellants and Transfare, Inc., the operator of the
vice station, to recover possession and for damages,
ing their suit on the alleged existence of a lease. The
igation was pending from October 27, 1958 until April 11,
2, during which time Transfare, Inc., vacated and the
mises remained vacant throughout that litigation and until
ree quieting title in Appellants was entered in this case
April 27, 1963. Judge Jay Rabinowitz, who heard the case
hout a jury in the State Court, found that no lease ex-
ed, but did find:

"A requirements contract which purported
to bind Hart *** to purchase Union gasoline
for sale on the subject premises" (TR. 79)

apparent purpose of which -

"Was to bind the owner operator to Union's
product, as well as to impose a sanction in
order to obtain an exclusive outlet for
Union's gasoline" (TR 79)

that -

"It is apparent that Union desired to tie up
the subject premises to maintain an exclusive
outlet for the sale of its gasoline (TR. 85-86)

* * *



"The consent clause is part and parcel of Union's objective of maintaining its exclusive outlet by continued binding of the owner-operator or the subject premises to a requirements contract. Since the date of the alleged breaches by defendants and the inception of this litigation to the date of trial, Union has received of defendants precisely the object of the overriding intent of Union throughout this transaction, and that is that since the alleged breaches to the date of trial, Union's, and only Union's, gasoline has been sold from defendants' premises." (TR. 87)

LATERAL ESTOPPEL

The above quotations are from the opinion of Judge Jay Knowlitz dated October 19, 1961, and incorporated by reference as a part of the Findings of Fact and Conclusions of Law in Civil Action 10,230 in the State Court at Fairbanks, titled "Union Oil Company of California, a corporation, Plaintiff, vs. Robert Hoopes and Rae S. Hoopes, defendants", insofar as the same are consistent with the Findings of Fact entered in said cause (TR. 26). There are no inconsistencies (TR. 26-39).

Judge Walter H. Hodge, by his pre-trial order of May 1963, in this case (TR. 114-115) held that under the doctrine of collateral estoppel the issues "of fact and law" determined in Civil Action 10,230 at Fairbanks and essential to the judgment in that case could not be relitigated here. On the trial of this case "are to the extent material, facts so deemed and considered as exclusively established" between the litigants here. Appellee does not dispute the binding effect of the former proceedings (TR. 10, Vol. 3).



INTERROGATORIES

Answers to interrogatories propounded to Appellant
ert Hoopes substantiate the allegations of the Complaint
147).

Answers to interrogatories propounded to Appellee
sofar as they were answered at all, established the alleg-
ons of the Complaint as to Appellee's position as a major
ducer, refiner, of petroleum products in the Pacific Coast
a, a fact which can hardly be disputed. But as previously
tioned (page 2, supra) Appellee failed to answer interroga-
ries No. 11 (TR. 122), 12 and 13 (TR. 123) having to do
n rebates from posted prices given to service station
rators who purchased their requirements exclusively from
ellee. The amended interrogatories were served and filed
May of 1963 and objections to answering Nos. 11, 12 and
made by Appellee have completely dominated this case from
n until now (TR. 120).



SPECIFICATIONS OF ERROR

Trial Court erred -

(1) By that portion of its pre-trial order of May 1963 (TR. 14) denying Appellants' Motion for Summary judgment on the issue of liability;

(2) By its Memorandum to Counsel of October 15, 1963 (TR. 170) holding that Appellants, not being or having been competitive purchasers of the products of the Appellee, had no standing to sue for damages for violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 USCA Sec. 13), and that Appellee need not answer interrogatories seeking information respecting such violation;

(3) By its Memorandum to Counsel and Order of April 1965 (TR. 197) holding that appellants lacked standing to sue under Sections 1 and 2 of the Sherman Act (15 USCA Sec. 1 and 2) for the reason that not being operators of the radio station which is the subject of this suit, but owners, lessors or contract vendors thereof, they are not persons injured in their business or property by reason of anything forbidden in the Anti-Trust Laws within the meaning of 15 USCA Sec. 15 and also lacked standing to sue under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 USCA Sec. 13).

(4) By its Order of April 27, 1965, directing Partial Summary Judgment upon Less than All Claims, entered herein on

April 27, 1965, holding that Appellants recover nothing against Appellee for violation of Sections 1 and 2 of the Sherman Act (15 USCA Sec. 1 and 2) or Section 2 of the Clayton Act (15 USCA Sec. 13) or any of the other Federal Anti-Trust laws, including Section 3 of the Clayton Act (15 USCA Sec. 14);

(5) By entertaining and granting Motion for Summary Judgment before discovery was completed and while a genuine issue as to material facts existed.

SUMMARY OF ARGUMENT

The Complaint states a cause of action for violation of the Anti-Trust laws. The answer, interrogatories and admissions, together with the Findings of Fact, Conclusions of Law and Judgment of the Alaska State Court at Fairbanks in an action between the same parties, and by which Appellee is bound under the doctrine of collateral estoppel, establish such a violation.

Appellee objected to answering interrogatories concerning secret rebates and kickbacks to its independent service station operators and contended that appellants, not being purchasers of Appellee's petroleum products, and lessors rather than operators of the service station, had no standing to sue.

The Trial Court granted summary judgment on that basis before discovery was complete. Violation of the Anti-Trust laws having been established, and Appellants having been persons injured in their business and property by such violation, summary judgment should have been entered for Appellants rather than Appellee. The case should be remanded.

NOTE: Sections of the Anti-Trust Laws referred to in this brief are Reproduced in full in the appendix).

ARGUMENT

THE PRESENT POSTURE OF THE CASE

It can hardly be contended that the Complaint does not state a violation by Appellee of Section 1 of the Sherman Act, Title 15, Sec. 1, USCA, denouncing contracts in restraint of trade and Section 2 of the Sherman Act, Title 15, Sec. 2, USCA, making it a crime to monopolize or attempt to monopolize any part of trade or commerce, and Section 3 of the Clayton Act, Title 15, Sec. 14, USCA making it unlawful to sell, contract to sell or lease commodities on condition, agreement or understanding that the lessee or purchaser shall not deal in the commodities of competitors when the effect may be to substantially lessen competition or tend to create monopoly in any line of commerce.

These are Anti-Trust laws and an action for three-fold damages is granted "to any person who shall be injured in his business or property by reason of anything forbidden by the Anti-Trust Laws" by Section 4 of the Clayton Act, Title 15, Sec. 15, USCA.

ANY PERSON INJURED

We come now to the decisive point in this appeal. Judge Plummer held by his Memorandum to Counsel and Order of April 8, 1965 (TR. 197-200) that Appellants lacked standing to

ue for violations of Section 1 and 2 of the Sherman Act,
Title 15, USCA, Sections 1 and 2, and Section 2 of the Clayton
Act, as amended by the Robinson-Patman Act, Title 15 USCA,
Sec. 13. He made no mention of Section 3 of the Clayton
Act, Title 15, Sec. 14 USCA, although he stated his belief
that in so holding all Anti-Trust claims were disposed of
(TR. 198). He specifically disclaimed any intention of
ruling on the issue of monopoly (TR. 198).

THE ISSUE

The issue then is not whether Appellee has violated
the Anti-Trust Laws. A violation is well pleaded and as
said in Simpson v. Union Oil Company of California (9th Cir.
1963), 311 F. Rep. 2d 764, 765, and in the same case on
appeal, Simpson v. Union Oil Company, 12 L. ed 2d 98 (Dec.
Apr. 20, 1964) a violation will be assumed for the purpose
of the Motion for Summary Judgment.

STANDING TO SUE

Judge Plummer found at the urging of Appellee, that
appellants were not injured by reason of the assumed violation
and therefore have no standing to sue. Appellee's contentions
as evidenced by the record are -

(1) Appellants as Lessors have no standing to
sue (TR. 7, Vol. 3) and

(2) Appellants, not being or having been competitive
purchasers of the products of Appellee are not entitled to
sue for damages for alleged violation of the Robinson-Patman

Act. (Appellee's objections to answering interrogatories (TR. 126-127)).

(1) LESSORS

This Court pointed out in Simpson v. Union Oil Company (Appellee here) 311 F. 2d 764, 768 that a treble damage action is in tort and not affected by privity of contract or lack of it. The Supreme Court on appeal went further and held that there is actionable wrong whenever restraint of trade or monopolistic practice has an impact on the market -

"And it matters not that complainant may be only one merchant."

Harrison v. Paramount Pictures, 115 F. Supp. 312, Aff. 3rd Cir., 211 F. 2d 405, C.D. 348 U.S. 628, was relied upon by Appellee in the Court below and an effort was made by Appellants to distinguish the decision of this court in Steiner v. Twentieth Century Fox Film Corporation (9th Cir. 1956) 232 F. 2d 190.

Application of the holding of this Court in Steiner, supra, must turn on the factual situation that existed in Steiner when the case was heard and decided as compared with the factual situation here on the present state of the record. Appellant Steiner was the owner there, as are Appellants here. The Hansens were the lessees of Appellant there as Transfare, Inc., here, between May 19, 1958 and April 30, 1961, although that status was denied by Appellants. The Hansens, as lessees there, were not parties to the litigation and Transfare, Inc.,

as the Lessee of Appellants during the period above mentioned is not a party to the litigation here; the case having been dismissed as to them. The Hansens were originally joined as defendants in Steiner, but the action was dismissed as to them before the appeal which resulted when the above decision was taken. This is clearly established on page 193 of the decision where the Court said:

"After remand Appellant dismissed her Complaint against the Hansens and re-appealed."

This Court in Steiner quickly distinguished the factual situation in the Harrison decision relied upon by Appellee, by saying on page 193:

"The Appellees assert that as a matter of law the Appellants interest as a landlord is too remote to permit recovery. The cases cited by the Appellees are not factually similar to the case at bar. In Harrison v. Paramount Pictures, D.C. E.D. Pa. 115 F. Supp. 312, Aff. 3rd Cir. 1954; 211 F. 2d 405, there was no direct dealings between the plaintiff and defendant. Here the Appellant asserts the Appellees conspired with the prime lessee to force Appellant to receive less than a reasonable rent."

While no conspiracy is alleged here, it is alleged that the contracts, agreements, arrangements, etc., as found by Judge Abinowitz to exist between Appellee and Hart and Transfare, Inc., his assignee, were in violation of the anti-trust laws and resulted in the financial failure of Transfare, Inc., and the closure of the service station, with a direct injury to Appellants in the form of lost rentals and depreciated property value. Further direct injury to Appellants was inflicted by the action of Appellee in instituting proceedings to

repossess the service station under the terms of the unlawful exclusive requirements contract.

Again on page 194 of Steiner, supra, the Court said:

"However, the Complaint asserts the Appellees in concert with Hansen forced the Appellees to do the acts detrimental to her reversionary interest, such as granting to the Hansens in 1938 more favorable lease terms than could have been obtained in a free competitive market, and gave options to renew without adequate consideration. This is sufficient to state an anti-trust claim by a landlord."

The facts alleged here go far beyond those asserted in Steiner. Appellants not only lost the rental from the property by reason of the acts of Appellee, but Appellee thereafter, by harassing litigation, threats, letters, etc., prevented appellants from finding a new tenant and caused the value of the property to deteriorate (Para. 24 of the Complaint, TR, 4, 15). It was only the judgment of the trial court quieting title in Hoopes, entered April 17, 1963, (TR. 114) that enabled appellants to offer the property for rental or sale without threat of reprisal from Appellee. The impact of Appellee's wrongful action was directly on Appellants. The recovery sought is for damages suffered directly by Appellants and not through Hart or Transfare, Inc.

TEST APPLIED BY STEINER

The test applied by Steiner is not whether the plaintiff joined the Lessee as a party defendant, or whether the Lessee is a participant as distinguished from a victim. The question to be determined is whether the wrongful acts directly

injured the plaintiff. It is the test of remoteness. The landlord cannot recover for injury to his tenant alone, but only when he himself is injured. The wrongful acts of Appellee were directed at Appellants and resulted in injury to them, commencing in April of 1961, when their rental income was cut off. Further acts of Appellee caused the value of their property to deteriorate.

The allegations of the Complaint, Answer, Memorandum Opinion, Findings of Fact and Conclusions of Law, Pre-Trial Orders, Affidavits, Answers to Interrogatories and Exhibits which constitute the present record in this case cover four distinct periods -

First Period: Between December 1st, 1955, when Appellants sold to Hart and May 19, 1958, when Hart and Transfare quitclaimed to Appellants. Appellants were the Vendor and Hart the Vendee with Transfare, Inc., as his Assignee. There was no suggestion of a lessor-lessee relationship, and no injury was suffered by Appellants.

Second Period: Second, between May 19, 1958, and July 11, 1958. During this period of about 52 days, Transfare, Inc., was in peaceful and undisturbed possession and no injury was suffered by Appellants. Hoopes considered themselves lessors but Appellee did not.

Third Period: Third, between July 11, 1958, when Appellee gave notice to Appellants (TR. 60) that Appellee claimed to be lessor of the premises to Transfare, Inc., and

that Transfare, Inc., was delinquent "in payment of his rents to us" and that if the default was not remedied in fifteen days Appellee "will take over the operation of the premises", and the surrender of the premises by Transfare, Inc., on April 30, 1961 (TR. 59). During this entire period Appellee was denying the relationship of landlord and tenant between Appellants and Transfare, Inc., and seeking to regain possession of the premises from Appellants and Transfare, Inc., pursuant to the lease and lease-back agreements with Hart. On October 27, 1958, Appellee, in furtherance of its position above stated, commenced the Fairbanks action seeking possession and a money judgment.

Judge Rabinowitz found, as stated supra, that no relationship of landlord and tenant or lessor and lessee existed among any of the parties during any time prior to the conclusion of the trial on July 12, 1961. He found a "requirements contract divorced from any landlord-tenant implications" (TR. 17-A)

Fourth Period: Fourth, between the conclusion of the trial before Judge Rabinowitz on July 12, 1961, and April 17, 1963, when Judgment quieting title in Appellee was entered in this case (Tr. 1.4) During this period Mr. Merdes, attorney for Appellee, threatened that Appellee would enjoin any efforts by Appellants to lease the station (TR. 152) and in October, 1962, Scott and Merdes, attorneys for Appellee wrote threatening letters (TR. 49, 50). Officers and agents of Appellee informed

prospective lessees and their agents that Appellants had no authority to lease the premises (TR. 152 - containing answer of Appellant Hoopes to Appellee's interrogatory No. 32, TR. 145) . No suggestion of a Lessor-Lessee relationship. Only an effort to prevent one.

INJURY

The first injury suffered directly by Appellants was in April 1961, when Transfare, Inc., vacated the premises under pressure from Appellee. As a result, Appellants suffered a loss of rental income. This occurred during the third period above mentioned. Further damage was suffered by Appellants by reason of the continued acts and actions of Appellee throughout the remainder of the third period and all of the fourth period. The relationship of landlord and tenant did not and could not exist between Appellee and Transfare, Inc., after April 1961. Appellants were in possession. The actions of Appellee injured Appellants directly.

Furthermore, the contention of Appellee was that at all times after December 1st, 1955, Appellee was the Lessee of Appellants, pursuant to the lease and lease-back with Hart, and that Hart and Transfare, Inc., held under Appellee and not under appellants. If this contention was true, then Appellants as the landlords have joined Appellee, the lessee, as a defendant in this action and has alleged a cause of action and resultant damage directly against Appellee as such lessee. However, Judge Rabinowitz did not agree with

Appellee. He found an exclusive requirements contract and not a lease.

WRONGFUL ACTS

The wrongful acts of Appellee from which Appellants suffered direct damage were -

(a) Surrender and vacation of the premises in April 1961 as a result of the suit filed October 27, 1958 pursuant to its Notice of July 11, 1958, and other pressures by Appellee (TR. 58);

(b) The threat of Mr. Merdes, attorney for Appellee to obtain an injunction against Appellants in the event Appellants endeavored to lease the premises to someone other than Appellants (TR. 152);

(c) The actions of officers and agents of Appellee after the judgment in the Fairbanks case became final on June 12, 1962, in informing prospective lessees and their agents that Appellants had no authority to lease the premises (TR. 15, 16, 152);

(d) Letters of Scott and Merdes, attorneys for Appellee (TR. 49, 50);

(e) The resulting cloud on Title (TR. 57).

Under the test applied by Steiner, the injury is indirect and not remote. This is especially true since the

actual injury and damage suffered by Appellants was after April of 1961, while Appellants were in possession and looking for a tenant or purchaser.

THE HARRISON CASE

The Harrison decision (Harrison v. Paramount Pictures, 115 F. Supp. 312, aff. 3rd Cir. 211 F. 2d 405, c.d. 348 U.S. 828) relied upon by Appellee specifically distinguishes itself from the case at bar as follows:

"This is not a case in which by reason of the unlawful acts of the defendant a tenant has been forced to default in his rent. That situation need not be considered here."

The District Court decision in Harrison was affirmed in a per curiam opinion by the Third Circuit and apparently is still the law in that circuit in factual situations to which it applies. However, the Third Circuit has not been overly vigorous in its support. Chief Justice Biggs of the Third Circuit was openly critical of the Harrison decision in his dissent in Melrose Realty Company v. Lowe's Inc., 234 F. 2d 518, and advocated reconsideration of the rule laid down in Harrison. He distinguished Harrison from Steiner and approved the holding in Steiner. He agrees that the question is one of "remoteness", and cites the decision of Judge Learned Hand of the Second Circuit in Vines v. General Outdoor Advertising Co., 171 F. 2d 87 where Judge Hand pointed out on page 491 that the anti-trust laws give a right of action to "any person who shall be injured in his business or property by reason of anything forbidden in

the anti-trust laws", and that such action accrues to those
to injured "though they have no contract with the wrongdoer
but only an expectation of future dealing with him. * * *
The absence of any contract obligation gave the defendant no
more immunity from that tort than from any other tort." This
decision by Judge Learned Hand was previously cited with approv-
al by this Court, in Karseal Corporation v. Richfield Oil Corp-
oration (9th Cir.) 221 F. 2d 358, 363 where it is said:

"The treble damage action is one for a tort and
punitive and compensatory damages is the relief
granted. 'Under the Clayton Act the right is not
confined to persons in privity with the wrongdoer,
but is given to anyone who has suffered injury to
his business or property by reason of the wrongful
acts.' Clark Oil Co. v. Phillips Petroleum Co.,
supra, 148 F. 2d at pages 582-583. Vinces v. General
Outdoor Advertising Co., 2nd Cir., 1948, 171 F. 2d
487, 491."

The Court in Harrison went on to say that if an injury
could be traced to the acts of the defendant, the "question
of remoteness remains" and "it is not possible to formulate
any general rule by which to determine what injuries are too
remote to bring a plaintiff within the scope of the Act and I
shall not attempt to do so. Each case must be dealt with on
its own facts."

In other words, the Court bottomed its decision in
Harrison on remoteness of the injury and not on the legal
relationship between plaintiff and defendant or whether or not
the lessee if there was a lessee, was a violator or a victim.

Harrison, received rough treatment by the 7th Circuit

Congress Building Corporation v. Lowe's Inc., (7th Cir. 1957) 246 F. 2d 587. The Seventh Circuit, after dissecting the Opinion and the reasoning upon which it was based, said on page 595:

"We therefor decline to follow the rule laid down by the Third Circuit in Harrison and Melrose decisions."

The Seventh Circuit pointed out on page 589 of its decision in Congress, this Court had distinguished Harrison in its decision in the Steiner case.

The decision in Congress analyzes the cases in which Harrison has been followed. None of those mentioned involved the Lessor-Lessee or Landlord-Tenant relationship, but concerned patent holders, insurance brokers and suppliers.

Furthermore, as Congress points out on page 592 the Supreme Court of the United States in 1957, after the Harrison decision and others like it restricting the remedies of private litigants under the anti-trust laws, admonished the Federal Courts that they should not:

"Add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws [Anti-Trust] Radovich v. National Football League, 352 U.S. 445, 453, 454, 77 S. Ct. 390, 395, 1 L. ed. 2d 456, 462.

Radovich is quoted in the same vein in Simpson v. Union Oil Co. (Dec. Apr. 20, 1965) 12 L. ed. 2d 98, 102.

Productive Inventions, Inc., vs. Trico Products Corp., (7th Cir. 1955) 224 F. 2d 678, has been urged but like Harrison it did not involve the landlord-tenant lessee-lessor



relationship, but that of a patent holder and his licensee. The licensee was injured by the Anti-Trust violation. The Court held the injury to the patent holder to be indirect and too remote. The Court, however, said:

"No hard and fast rule can be laid down in those situations as the line between direct and incidental damage is not always definable with clarity. All we have determined is that under the facts pleaded appellant has no right to recover treble damage."

NALLY

Appellee is estopped from asserting a landlord-tenant lessor-lessee relationship between Appellants and Hart and his Assignee, Transfare, Inc., or Appellee itself. Judge Rabinowitz found that the documents and transactions between the parties were not leases, but an exclusive requirements contract extracted from Hart by Appellee at the time Hart was a contract purchaser of the service station property. That finding is not open to question here. Furthermore, when the decision by Judge Rabinowitz was announced, Appellee immediately abandoned any pretense of lessor-lessee relationship and claimed on the basis of that decision to be holder of an exclusive requirements contract binding Appellants to dispense only Appellee's products from the premises until 1960 (TR. 4, 50)

COMPETITIVE PURCHASERS

The contention that Appellants, not being purchasers from Appellee have no standing to sue for damages suffered as a result of the price discrimination pleaded in violation of

Sec. 2(a) of the Clayton Act as amended by the Robinson-Patman Act, Title 15 USCA Sec. 13(a). This was the trial court's ruling (TR. 197-198). It also assumed that the ruling bars all actions for violation of the anti-trust laws. This was the contention of Appellee below.

It is submitted that even if the right to maintain treble damage actions for violation of Section 2(a) of the Clayton Act was limited to purchasers from the violator, still the limitation would not apply to actions for violation of other anti-trust laws. But the entire premise is wrong. The status of purchaser is not a prerequisite to suit for violation of Section 2(a) of the Clayton Act, Title 15, Sec. 13(a) USCA.

AUTHORITIES CITED BELOW

Two cases were cited below in support of Appellee's position. The principal one being Klein v. Lionel Corporation (3rd Cir. 1956) 237 F. 2d 13, 15. It must be admitted that the decision appears to support Appellee's contention. The court may have attempted to announce such a rule, but it did not attempt to apply it in the case under decision. It not only found that the plaintiff Klein was not a purchaser, but also found that he failed to show that there had been two purchasers from defendant, one of whom was discriminated against within the meaning of the Act. This is apparent from the careful reading of the decision and that of the trial court where the case originated (See Klein v. Lionel, D.C. Dela. 1956,

138 F. Supp. 560) and of the authorities cited by the Circuit Court in support of its holding.

The entire language of the Circuit Court in the Klein opinion pertinent to the question of standing to sue is found on page 14 and 15 and reads as follows:

"[1,2] The decisions of many cases have crystallized the rule that an individual can have no cause of action under Section 2(a) of the Clayton Act unless he is an actual purchaser from the person charged with the discrimination. In Shaw's Inc., v. Wilson-Jones Co., 3rd Cir. 1939, 105 F. 2d 331, 333, we stated: 'The discrimination in price referred to must be practiced between different purchasers'. Therefore, at least two purchases must have taken place. The term purchasers means simply one who purchases, a buyer, a vendee. Klein did purchase Lionel products, but not from Lionel. It follows that the necessary requisite of two purchasers from the same vendor is not met and Klein therefore can claim no protection under the Act as a direct purchaser."

The case fell because there was no showing of "two purchasers from the same vendor" and not because plaintiff was not a purchaser from defendant.

Any other construction makes the decision contrary to the authorities cited by the Judge who wrote it as will be demonstrated later. Furthermore, and just as important, the case has never been cited in support of the proposition that standing to sue for violation of Section 2(a) of the Clayton Act, Title 15, Sec. 13(a) USCA, is dependent upon plaintiff being one of the direct purchasers.

All of the cases cited in Klein, supra, except FTC v. Morton Salt Co. (1948) 334 U.S. 37, 45, 68 S. Ct. 822; 92 L. Ed. 1196, lay down the same rule. That rule is that there

must be two purchasers from the same seller in order to support an action for treble damages under Title 15, Section 13(a) USCA. Not a single case holds that only an actual purchaser has standing to sue. In the Morton Salt Co., supra, case, the Supreme Court held that FTC "need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors. FTC was the plaintiff and nothing was said about standing to sue in a treble damage action.

SECOND CASE CITED IN SUPPORT

The decision in Schwartz & Sons, Inc., v. Sunkist Growers, Inc., (D.C. Mich. 1962) 203 F. Supp. 92, the second authority cited below by Appellee treats with a different set of facts and a different subsection of the Clayton Act than is involved here. As the Court stated on page 95 of the decision, Plaintiff based its action exclusively on sub-section (e) of Section 13, Title 15, USCA, which prohibits discrimination:

"In favor of one purchaser against another purchaser" furnishing services or facilities not accorded to all purchasers. The Court on page 99 of the decision said:

"We conclude that the alleged violators of 15 USCA, Section 13(e) are not within the purview of said statute. The prohibition contained in the statute is therein stated to be discrimination 'in favor of one purchaser against another purchaser of a commodity bought for resale ***. *** How can plaintiffs rely upon the matter of discrimination for their cause of action without preliminarily establishing that they are purchasers? *** Chief Judge Biggs stated unequivocally that one must be a direct purchaser to be entitled to protection under the Act (Title 15 USCA Sec. 13(e) *** We conclude

"that plaintiffs are not purchasers within the meaning of 15 USCA Section 13(e)."

Section 13(e) of Title 15 prohibits the furnishing of advertising matter, showcases, display material, free delivery, etc., to one purchaser of products bought for resale and not to another. The violation is "to discriminate in favor of one purchaser against another purchaser". No such language is found in Section 13(a), and no such facts are present here.

The reference to Chief Judge Biggs is to the language in Klein, supra. The Michigan District Court apparently thought the language in Klein referred only to Section 13(e) or at least that it was correct only with respect to that subdivision.

OTHER DECISIONS

The same is true of every other decision cited either in Klein or in which Klein is cited as support. Appellants cannot find where any other Court has stated or applied a rule limiting treble damage recoveries under Sec. 2a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 USCA Sec. 13(a) to cases where the plaintiff purchased from defendant. Several have placed that limitation on actions founded on Sec. 13(e) of Title 15.

SUPREME COURT AND OTHER CIRCUITS

In any event the rule which Appellee contends was announced by the Third Circuit in Klein supra, has not been approved by the Supreme Court and has never been followed in

any other Circuit.

SECOND CIRCUIT

The Second Circuit is not in agreement with the contention of Appellee. There the rule announced in Midland Oil v. Sinclair, infra, has been cited with approval. In Package Closure Corporation v. Sealright Company (2nd Cir. 1944) 141 F. 2d 972, 980, Circuit Judge Frank, speaking with respect to standing to sue under the price discrimination provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 USCA, Sec. 13(a) said:

"It is not necessary that plaintiff show that it was a purchaser against whom defendant discriminated." (Citing Midland Oil v. Sinclair, infra)

Since Judge Frank disagreed in part with the other two judges, it might be contended that the above quotation represents the minority view. We do not think so. Judge Frank spoke for the entire Court. There is nothing which indicates the others were in disagreement on this point.

SIXTH CIRCUIT

In Ludwig v. American Greeting Corporation (6th Cir. 1959) 264 F. 2d 286, 289, the Sixth Circuit Court in reversing the trial court said:

"[5] The opinion of the District Judge indicates that the principal reason for his ruling was because this action was on behalf of a competitor of the Appellant rather than by a customer claiming discrimination between himself and another customer. *** The Act has been construed as giving a right of action to a competitor who is injured in his business as well as to a customer who has been discriminated against. Moore v. Mead's Fine Bread Co., 348 US 115, 118, 75 S. Ct. 148, 99 L. ed. 145; Mandeville Island

"Farms, Inc., v. American Crystal Sugar Co., 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. ed. 1328; Central Ice Cream Co., v. Golden Rod Ice Cream Co., 7 Cir. 257 F. 2d 417, 418; Kentucky Tennessee Light & Power Co. v. Nashville Coal Co., D.C. Ky., 37 F. Supp. 728, 735; Aff. Fitch v. Kentucky Tennessee Light & Power Co., etc., 6 Cir. 136 F. 2d 12, 149 A.L.R. 650, Streiffer v. Seafarers Sea Chest Corp., D.C., E.D. La., 162 F. Supp. 602, 607."

SEVENTH CIRCUIT

No Circuit Court decision has been found in the Seventh Circuit touching on the question of standing to sue. But a District Court of that Circuit has passed directly on the question. Midland Oil Company v. Sinclair Refining Company, (D.C. Ill. 1941) 41 F. Supp. 436, was an action for treble damages sustained by plaintiff, a gasoline distributor, by sales of gasoline at discriminatory prices by Sinclair Oil Company to two of its own customers, neither of which was plaintiff. The Court said on page 438:

"Section 15 of Title 15 of the United States Code Annotated provides that 'Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue' etc. Section 13(a) of Title 15 USCA (being one of the anti-trust laws referred to in Section 15) provides that 'It shall be unlawfull *** to discriminate in price between different purchasers of commodities of like grade and quality. ***'

"The plaintiff's second amended complaint recites that the defendant has discriminated between certain of its customers and that as a result of that discrimination by the defendant between its customers, the plaintiff engaged in a similar line of business to that operated by the defendant was injured in his business and property. Thus it will be seen that the plaintiff sets up a cause of action substantially in the language of the Statute. ***

"Section 15 gives the right to an individual to

"sue for damage that he has sustained whether or not the public interest is affected thereby. Nor is it necessary for the party injured to be operating a business in interstate commerce or to have been a purchaser discriminated against by the defendant. The requirements of the Act are met if the defendant is engaged in interstate commerce and has discriminated between some of its purchasers and the plaintiff damaged thereby."

This is the case cited with approval by the Second Circuit in Package Closure Corporation v. Sealright Company, supra,

Finally we come to consideration of the rule in this circuit. We submit that the decision of this Circuit Court in Karseal Corporation v. Richfield Oil Corporation (9th Cir 1955) 221 F. 2d 358, is conclusive on the point.

It is true that the precise section of the statute involved here was not relied on in Karseal, supra. The action there was for violation of Section 3 of the Clayton Act (15 USCA 14) and not Section 2. Nevertheless, the Court said on page 363:

"Under the Clayton Act the right is not confined to persons in privity with the wrongdoer, but is given to anyone who has suffered injury in his business or property by reason of the wrongful acts."

Again on page 364 the Court in rejecting the argument of Richfield there (and Appellee here) that plaintiff distributor (there) and Appellants' lessee (here) might have a cause of action, but their principal would not, said:

"But it would appear that both the manufacturer and the independent distributor have such a cause of action."

Again on page 365 and on the same subject, the Court said:

"An interpretation which would read into the statute an unjustifiable restriction as to persons authorized to bring the action, might call for invalidation of the statute. The language of the statute does not warrant such a restrictive interpretation. The Congress in the Clayton Act, stated in Section 4, 'Any person who shall be injured *** may sue ***'" (emphasis supplied by the Court)

This court pointed out on page 365 that the right of action for treble damages was part of the over-all plans of the Clayton Act and the -

"Right of the injured party to recover damages was intended to promote a greater respect for the Act."

and that -

"The treble damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute."

Other statements to the same effect are found in the decision.

In Steiner v. Twentieth Century Fox Film Corporation

9th Cir. 1956) 232 F. 2d 190, the action was for treble damages based on violation of Sections 1 and 2 of the Sherman Act. It was asserted by defendant on appeal that plaintiff, as landlord, could not recover for loss of income from and value of his theatre property by reason of monopolistic acts of defendant and lessee. This Court held that the landlord had standing to sue, even though privity was lacking.

SUPREME COURT

Appellee's argument for a rule narrowly restricting the right to sue receives no support from the Supreme Court. Two relatively recent far-reaching, hard-fought decisions involved

treble damage actions for price discrimination by plaintiffs who were not purchasers from defendant. In both cases the Court held without hesitation that the action was well founded. The precise question of plaintiff's standing to sue was not commented upon directly by the Court. However, standing to sue existed in the cases or they could not have been maintained.

In Moore v. Mead's Fine Bread Company (1954) 348 U.S. 15, 75 S. Ct. 148, 99 L. ed 145, the Court in referring to the act of defendant in cutting bread prices to its distributors in one area, but not in another (price discrimination) thereby damaging plaintiff who produced his own bread and was not a purchaser from the defendant, said:

"This type of price-cutting was held to be 'foreign to any legitimate commercial competition even prior to the Robinson-Patman Act.'"

The action for treble damages was sustained.

In Safeway Stores v. Vance (1957) 355 U.S. 389, 78 S. Ct. 358, 2 L. ed 2d 350, the action was for selling at unreasonably low prices and price discrimination and was pleaded under Section 3 of the Robinson-Patman Act. The Court on the basis of its decision in Nashville Milk Company v. Carnation Company (1958) 355 U.S. 373, 78 S. Ct. 352, 2 L. ed 2d 340, dismissed the action insofar as it rested on alleged unlawful selling at low prices in violation of Section 3 of the Robinson-Patman Act, but held that plaintiff was entitled to a trial on the charge of unlawful price discrim-

summary judgment for Appellants and should do so. Other Circuits have so acted under similar circumstances. International Longshoremen's Association v. Seatrain Lines, Inc., (2nd Cir. 1964) 326 F. 916; Proctor & Gamble Ind. Union v. Proctor and Gamble Manufacturing Co. (2nd Cir. 1962) 312 F. 2d 181, 190.

The Supreme Court took similar action under similar circumstances in Simpson v. Union Oil, 12 L. ed 2d 98, where summary judgment had been granted Union Oil Company below. The Court found that the record established a violation of the Anti-Trust laws and a right of action in Simpson. As the Court said on page 106 of the decision:

"Hence on the issue of resale price maintenance under the Sherman Act there is nothing left to be tried."

The case was remanded for assessment of damages. The question then is whether or not the Findings of Fact and Conclusions of Law and Judgment in Civil Action 10,230 together with other acts and admission of Appellee show a violation of the anti-trust laws. We submit that they do.

Important and perhaps decisive on this question is the recent decision of the Supreme Court in Simpson vs. Union supra, where Appellee here was found in violation there on a record much less persuasive than this one. The violation was price maintenance. Here it is a series of actions, agreements, threats and coercion whereby Appellee attempted to and did monopolize a part of trade and commerce.

SECTIONS 1 and 2 OF THE SHERMAN ACT

Actions and agreements perhaps different in form, but so similar in substance and effect as not to be distinguished were denounced by Judge Yankwitz in the Standard and Richfield cases, as violative of the Sherman Act and the decisions were affirmed by the Supreme Court in U.S. vs. Standard Oil Company (S.D. Calif. 1948) 78 F. Supp. 850, Aff. Standard Oil Company of California v. U.S. (1949) 337 U.S. 293, U.S. Vs. Richfield Oil Corporation (S.D. Calif. 1951) 99 F. Supp. 280 Aff. Richfield Oil Corporation v. U.S. (1952) 343 U.S. 922.

In the recent decision of this Court in Lessig v. Tidewater Oil Company (9th Cir. 1964) 327 F. 2d 459, the Court said on page 474 of its decision -

"We rejected the premise that probability of actual monopoly is an essential element of proof or attempt to monopolize."

"When the charge is attempt (or conspiracy) to monopolize rather than monopoly, the relevant market is 'not an issue'"

Judge Rabinowitz found that "the overriding intent of Appellee was to see that Appellee, and only Appellee's gasoline was sold on the premises (TR. 24). He went further and held that Appellee was successful in its efforts. (TR. 24).

But this was not all. Appellee intended and attempted to oust the operators of the service station and take over its operation to further insure that only Appellee's products could be sold there (TR. 60). Through its attorney it attempted

to impose the requirement that only Appellee's products be dispensed on the premises (TR. 49, 50) for 8 or more years after trial.

We talk here of something more than just an agreement not to purchase the commodities of a competitor in violation of Section 3 of the Clayton Act. Appellee from 1958 to 1963, a period of five years, made a concerted and successful effort to insure to themselves a monopoly in the distribution of petroleum products at the service station which was one of the six (TR. 134), through which Appellee distributed approximately 25% of the petroleum requirements of the area. Appellee has successfully concealed what happened at the other five stations. They boldly and publicly asserted the right to continue for the balance of the fourteen year contract.

SECTION 3 OF THE CLAYTON ACT

In Standard Oil, supra, Judge Frankfurter, after describing the exclusive dealing contracts put into effect by Standard said on page 298 of 337 U.S. -

"Obviously the contracts here at issue would be proscribed if Section 3 stopped short of the qualifying clause ***"

Justice Frankfurter had reference to Section 3 of the Clayton Act and the qualifying clause, which reads -

"Where the effect of such lease, sale or contract for sale, or such conditions, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Applied here the holding in Standard, supra, reduces the question of a violation of Section 3 of the Clayton Act, to whether or not the actions of Appellee "may be to substantially lessen competition or tend to create a monopoly in any line of commerce". In the Standard, Richfield and Simpson v. Union Oil cases there was proof of many offending contracts or agreements. Here there is but one. This is necessarily so because Appellee successfully resisted answers to interrogatories respecting the existence of others. There is an additional one that can be judicially noticed. That is the arrangement found to exist and commented upon by Judge Folta in City of Ketchikan v. Lot 5, etc., (Alaska 1954) 126 F. Supp. 461, 15 Alaska 287, wherein the Court said -

"It appears to be a well established policy of the Company [Union Oil] to obtain exclusive outlets for the sale of its products."

LESSIG V. TIDEWATER OIL COMPANY

In Lessig, supra, this Court on page 473 said -

"The Clayton Act's prohibition of agreements which tend to create a monopoly" is violated though the tendency is a creeping one rather than one at full gallop; nor does the law await at the goal before condemning the direction of the movement."

SECTION 2(a) OF THE CLAYTON ACT - APPELLEE'S DILEMA

Unlike the other violations pleaded, there is no proof in the present record of price discrimination in violation of Section 2(a) of the Clayton Act, Title 15, Sec. 13(a).

The proof is of restraint and imposition of an exclusive requirements contract of long duration. There can be no proof of price discrimination or lack of it until Appellee answers the interrogatories. These answers must inevitably show that Appellee granted secret rebates to all of its independent outlets or only to some of them. If a kickback was given to some and not all, a price discrimination results. If it was given to all under circumstances similar to the arrangement with Hart and Transfare, Inc., the restraint and impact on competition is further aggravated. It is for this reason that Appellees fought hard and successfully in the lower court to conceal their activities.

SUMMARY

"Defendant's counsel was pursuing the customary practice in anti-trust cases of segmenting the case into parts as small and precise as possible and then attempting to demonstrate there was nothing of merit in each particular part or segment."

The above language was used by this Court in Simpson v. Union Oil Company of California (9th Cir. 1963) 311 FR 2d 764-767. It applies equally to this case.

Appellee, always protesting innocence, raised one obstacle after another to the answering of the interrogatories. Being confronted with a violation alleged by Appellants and established by the Findings in the Fairbanks case, Appellee retreated to the position that Appellants lacked standing to sue.

This is the only question in the case and it is without merit. There is some authority in the Third Circuit for the

proposition that the status of purchaser is a pre-requisite to the right to maintain a treble damage action for violation of Section 2(e) of the Clayton Act, Title 15, Sec. 13(e) USCA. By loose language the holding was applied in actions for violation of Sections 2(a) of the Clayton Act as amended by the Robinson-Patman Act, Title 15, Section 13(a) USCA. The rule is not persuasive and is definitely not the law of this Circuit. The action here is for violation of all of the anti-trust laws with particular emphasis on Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Appellee also contends that Appellants were lessors and as such lack standing to sue for violation of Section 3 of the Clayton Act. This contention is also without merit.

There is no authority anywhere for the proposition that plaintiffs must be purchasers and that lessors are disqualified to maintain actions for violations of Sections 1 and 2 of the Sherman Act. But Appellee is not without a position here. It asserts, without authority, that the alleged but non-existent disqualification to sue for violation of the Clayton Act operates in some way not disclosed to disqualify appellants from maintaining any action under the anti-trust laws where the facts alleged show a violation of both the Sherman Act and the Clayton Act. The contention falls of its own weight.

THE AMERICAN CAN COMPANY CASE

This inquiry would not be complete without considering

87 F. Supp. 18. By his decision there Judge Harris held -

(1) The five years exclusive requirements contract placed in effect by American Can Company was not violative of Section 3 of the Clayton Act (page 32).

(2) Exclusive requirements contracts are not per se in violation of Sections 1 and 2 of the Sherman Act, but a five years exclusive requirements contract when examined in the light of its possible effect upon trade and commerce creates an unreasonable restraint in violation of Sections 1 and 2 of the Sherman Act (page 32)"

(3) A similar contract for one year would not be unreasonable and would permit competitive influence to operate at the expiration of the period, thus removing the vice of the five-years contract. The user consumer would be guaranteed and assured supply and protected by the obligation on the part of the supplier to meet his total needs for the limited one-year period.

In other words, exclusive requirements contracts are not necessarily in violation of Section 3 of the Clayton Act and if reasonable in duration are not in violation of the Sherman Act. But such a contract with a term of five years creates an unreasonable restraint because of its possible effect on trade and commerce.

What is the result of the application of that rule here? The contract was of fourteen years duration. The Appellee by its actions as found by Judge Rabinowitz fully enforced in every day of its existence until the conclusion of the trial at Fairbanks and thereafter until stopped by the Decree in the District Court in this case quieting title in Appellants. Appellee exercised complete restraint on the service station operators and they were compelled to and did

dispense only Appellee's products.

It will be argued that the market restrained was small - only a single outlet. Size of the market controlled and the extent of the competition restrained is not the test, rather it is the extent of the control and restraint. The control and restraint here were 100%. It was not only probable, but real.

A similar argument was made and rejected in United States v. National City Lines (7th Cir. 1951) 186 F. 2d 562, 567 where it was contended that since only a single user in each of several cities was induced to enter into the restraining contract that the Sherman Act was not violated. The Court said on page 567 -

"The Anti-Trust laws forbid practices through which competition or competitors are shut out of the market by provisions that limits it [a product] not in terms of quantity, but in terms of a particular venture."

In Union Carbide and Carbon Corporation v. Nisely (10th Cir. 1962) 300 F. 2d 561, 565 the Circuit Court said -

"But Sec. 1 of the Sherman Act condemns unreasonable restraints, irrespective of the amount of trade or commerce involved; and Section 2 condemns monopoly or attempt to monopolize either in concert or individually - any part of the trade or commerce."

THE STATUTE OF LIMITATIONS

Appellee argued below that the action is barred by the four-years statute of limitations, Title 15, Sec. 15(b) USCA. Judge Hodge disposed of this contention by his

pre-trial order of May 17, 1963, where he said that the issue as to violation of the Anti-Trust laws was -

"To be determined in this case subject to the four year statute of limitations as set forth in Title 15, Sec. 15(b) USCA which shall be considered controlling as to the accrual of the cause of action herein, but shall be considered to commence to run from the time of each successive injury to the plaintiffs ***"

He would hardly have held otherwise in view of the decisions of this court in Foster & Kleiser v. Special Site Sign Company (9th Cir. 1936); 85 F. 2d 742, 750 and Sukow Borax Mines Consolidated, Ltd., v. Borax Consolidated, Ltd., (9th Cir. 1950) 185 F. 2d 196-203, wherein the rule is laid down that a cause of action for treble damages arises when the damage is realized and the plaintiff's interest invaded. That occurred in this case April 30, 1961, when Transfare, Inc., was forced by unlawful actions of Appellee to vacate the service station to the damage of Appellants. See also Crummer Company v. Dupont (5th Cir. 1955) 223 F. 2d 238, 247 and the very recent case of Highland Supply Corporation v. Reynond Metals Company, 327 F. 2d 725.

CONCLUSION

The case should be remanded.

Respectfully submitted this 28th day of July, 1965.

W C Arnold
W.C. ARNOLD, Attorney for Appellants

CERTIFICATE OF COUNSEL

I Certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

W C Arnold
W.C. ARNOLD, Attorney for Appellants

APPENDIX

EXHIBITS

Identified, offered
and received

A - Taxable
Gallonage - Alaska (TR. 219)

TR 4, Vol. III

B - Taxable Sale (TR. 220)

TR. 4, Vol. III

Section 1 of Sherman Act, Title 15 USCA, Sec. 1

"§1. Trust, etc., in restraint of trade illegal;
exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: PROVIDED, That nothing contained in Sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory or the District of Columbia in which such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: PROVIDED FURTHER, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court. July 2, 1890, c. 647 § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282."

Section 2(a) of the Clayton Act as amended by the
Robinson-Patman Act, Title 15 USCA, Sec. 2(a)

"Discrimination in price, services, or facilities -
Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them, PROVIDED, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such sold or delivered ***"

Section 2(e) of the Clayton Act as Amended by the Robinson-
Patman Act, Title 15 USCA, Sec. 2(e)

"Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Section 2 of Sherman Act, Title 15, USCA, Sec. 2

"§2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize or attempt to monopolize, or combine or conspire with other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court. July 2, 1890, c. 647, §2, 26 Stat. 209; July 7, 1955, C.281, 69 Stat. 282

Section 3 of Clayton Act, Title 15 USCA, Sec. 14

"§14, Sale, etc. on agreement not to use goods of

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3. 38 Stat. 731.

Section 4 of the Clayton Act, Title 15 USCA, Sec. 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38 Stat. 731.

No. 20183

In the

United States Court of Appeals

for the Ninth Circuit

THE TRAVELERS INSURANCE COMPANY
and

THE TRAVELERS INDEMNITY COMPANY,
Appellant,

vs.

REAN WILLIAM McELROY, JR.,
Appellee.

Reply Brief for the Travelers Insurance Company
and
The Travelers Indemnity Company

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In the
United States Court of Appeals
for the Ninth Circuit

THE TRAVELERS INSURANCE COMPANY and THE TRAVELERS INDEMNITY COMPANY, vs. REAN WILLIAM McELROY, JR.,	}	<i>Appellant,</i> <i>Appellee.</i>
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**Reply Brief for the Travelers Insurance Company
and
The Travelers Indemnity Company**

PRELIMINARY ARGUMENT

Appellee correctly states that a judgment [by *default*] was taken in the Superior Court of the State of Arizona against Trujeque in the amount of \$105,000.00, together with interest, on May 20, 1963.

Further, it is undisputed that Appellee, on December 5, 1963 filed in the District Court for the District of Arizona a complaint in Cause No. 4961 against Travelers Insurance Company. That complaint alleged *inter alia*, as follows:

“That the aforesaid insurance policy specifically by its terms, permits the plaintiff to bring this action based *on the judgment of the Superior Court of Maricopa County, and enforce the payment to the plaintiff from the named defendants.*” (Emphasis ours.)

Without question the above complaint in the instant case is an action based only upon the final *default* judgment rendered by the Superior Court of the State of Arizona in Cause No. 147641 (T.R. 33).

In view of the above, Appellant's replication will be directed initially to that sound legal principle set forth in Appellant's opening brief which Appellee refused to respond or refer to in his answering brief.

ARGUMENT

As set forth at page 7 of Appellant's opening brief, it cannot be disputed that Jacobs was the owner of the truck-tractor in question. When Appellee (plaintiff below) obtained his *default* judgment against Trujeque, which is the basis of this present action, plaintiff alleged in his complaint as follows: (T.R. 34)

“That on or about the 23rd day of December, 1962, at approximately 8:40 P.M., defendant MIKE E. TRUJEQUE, was driving a 1957 Freight-Way truck-tractor in a Northerly direction on North 51st Avenue in the City of Phoenix, Arizona; that said truck-tractor was, at said time, *owned by Defendant, DON JACOBS*, and that defendant, MIKE E. TRUJEQUE, was then and there operating said truck-tractor as the agent on behalf and with the consent, permission and authority of the *owner, defendant DON JACOBS.*” (Emphasis ours.)

As was set forth at page 7 of Appellant's (Travelers') opening brief:

“The above allegations by plaintiff in his Complaint filed in the Superior Court of the State of Arizona was the theory under which a judgment in the amount of \$105,000.00 was rendered. The fact of ownership became merged in the judgment rendered against Trujeque.”

Ownership, Appellee states, must be decided upon the theory of conflict of laws. It seems all too apparent that Appellee wishes to obscure the fact that ownership in this case has already been determined as a matter of law by their own action in obtaining the *default* judgment against Trujeque. Appellee’s brief is conspicuously silent as to any argument which would avoid the fact that the *default* judgment obtained by Appellee determined ownership.

Appellee *must* take this inconsistent and untenable position to bring this case within the purview of *Jenkins v. Mayflower Insurance Exchange*, 93 Ariz. 287, 380 P.2d 145. Their analysis is incorrect for they have ignored basic fundamental precepts.

1. A Default Judgment Conclusively Establishes So Far as Subsequent Proceedings on the Judgment Are Concerned, the Truth of All Material Allegations Contained in the Complaint in the First Action and Every Fact Necessary to Uphold the Default Judgment.

A judgment entered by default is just as conclusive upon the issues tendered by the complaint as if rendered after answer filed and a trial. *O’Brien v. Appling*, 283 P.2d 289 (1955); *Fitzgerald v. Herzer*, 177 P.2d 364 (1947); *Brown v. Brown*, 147 P. 1168 (1915); *Maryland Casualty Co. v. O’Meara*, 3 P.2d 46 (1931); *Garcia v. Garcia*, 306 P.2d 80 (1957). Further, it is basic that all well pleaded facts in a complaint are admitted by a default judgment. *Postal Ben. Ins. Co. v. Johnson*, 165 P.2d 173 (1946).

In Arizona there is found a leading case in point, *Collister v. Inter-State Fidelity Building & Loan Assn.*, 38 P.2d 626, wherein the Court stated at page 629:

"That the judgment was rendered by default does not affect its validity, for such a judgment *admits as true all the material allegations properly set forth in the complaint and is just as binding and conclusive as to them as though it had been rendered after answer and contest.*" (Emphasis ours.)

And, further (at page 629):

"... all matters in issue, or which could have been put in issue ... were settled by the judgment in that cause."

The courts have expressed the rule in various ways but the basic rule is that a default judgment is just as conclusive an adjudication of the facts and issues that are essential to support the judgment as one entered after actual litigation. *Morris v. Jones*, 329 U.S. 545 (1947); *Glasser v. Wessel*, 152 F.2d 428 (1945); *Re Mercury Engineering, Inc.*, 68 F. Supp. 376 (1946 D.C. Cal.); *Rogers v. Tapo*, 230 P.2d 522 (1951).

It cannot be seriously alleged that a default judgment is not conclusive as to all issues tendered by and properly pleaded in the complaint and as to every issue which properly belonged in the controversy *O'Brien v. Appling, supra*; *Adamik v. Adamik*, 75 N.Y.S. 2d 824 (1948); *Freeze v. Salot*, 266 P.2d 140 (1954); *Fitzgerald v. Herzer, supra*.

Appellee's original allegation of ownership of the vehicle in Jacobs was essential to the *default* judgment rendered against Trujeque. The fact of ownership in Jacobs was fully adjudicated and determined. The instant case is one based on that default judgment. To permit Appellee to assert ownership in another, in truth impeaches his own

default judgment. Appellee in ignoring the obvious, is on the "horns of a dilemma" for he in effect argues that he can obtain a judgment by default against Trujeque alleging ownership in Jacobs; sue to collect on *that default* judgment against Travelers Insurance Company and allege and vigorously maintain that C & P is now the owner of that same vehicle. A perusal of Appellee's complaint against Trujeque (T.R. 34-36) alleges ownership in Jacobs without equivocation and at *no time* is C & P mentioned either as owner, bailee or lessee of the vehicle in question. Appellee seeks to accomplish the impossible. He seeks on one hand to collect a default judgment from an insurer who entered into a contract with C & P and issued a non-owners policy of insurance [which is permissible in Arizona] for a truck or vehicle actually owned by Jacobs and on the other hand in obtaining that same default judgment he alleged and proved that Jacobs was the actual owner of that vehicle to the exclusion of any other entity. This the Appellee cannot do because the fact of ownership of necessity is merged in the default judgment obtained.

Appellant is astonished that Appellee has taken lightly the doctrines of res judicata and collateral attack. In the trial court on motion for summary judgment Appellee argued and re-argued the theory of permissive use of the vehicle in question by Trujeque. Appellant replied to those arguments. Appellee avoided and sidestepped the true area of dispute and continues to do so. [Appellee seeks to have this Court adopt a hybrid rule to enforce a default judgment conceived and authored by Appellee alone.] That the doctrine of res judicata applies is fundamental. At no time in any proceeding has a determination been made that C & P is the owner of the vehicle in question. In this action for the first time, when C & P is not a party, when the issue of

ownership has been determined in Cause No. 147641, [Maricopa County] on a suit to collect a default judgment does Appellee seek to introduce his new concept of *res judicata*. He in effect argues that ownership conclusively adjudicated in *Jacobs* is now by some unknown alchemy ownership in C & P. Or more devastatingly he argues that he can obtain a default judgment against Trujeque for \$105,000.00 based on one set of facts and collect on that same judgment under another incompatible set of facts. The doctrine of *res judicata* precludes the relitigation in the instant case of the issue of ownership because that issue was adjudicated and conclusively determined by the judgment rendered in the Superior Court of Arizona. *Garcia v. Garcia, supra*; *Bernhard v. Bank of America Nat. Trust & Sav. Assn.*, 122 P.2d 892 (1942); *Day v. Wiswall's Estate*, 381 P.2d 217 (1963).

2. Appellee Is Attacking His Own Judgment by Alleging Ownership in C & P.

In the instant case, the issues determined in the prior action precludes Appellee from arguing the ownership of the truck-tractor in someone other than *Jacobs*. Appellee by attempting to do so is collaterally attacking his own judgment. An action such as the instant one is an action to obtain a new judgment destroying the judicial findings which resulted in the former judgment. Without question this is a collateral attack and cannot be done. *Cox v. MacKenzie*, 70 Ariz. 308, 219 P.2d 1048 (1950); *Tuba City Min. & Mill Co. v. Otterson*, 16 Ariz. 305, 146 P. 203 (1915); *Shattuck v. Shattuck*, 67 Ariz. 122, 192 P.2d 229 (1948); *Hershey v. Banta*, 55 Ariz. 93, 99 P.2d 81 followed in *Hershey v. Republic Life Ins. Co.*, 55 Ariz. 104, 99 P.2d 85 (1940).

The Arizona Supreme Court has had frequent occasion to determine what constitutes a collateral attack and invariably has found that an attempt to obtain a judgment such

as is sought in this case constitutes a collateral attack upon the prior judgment. In *Tube City Mining & M. Co. v. Otter-son, supra*, the Court said of the attack:

“It is not an attempt to avoid or correct the former judgment in some manner prescribed by the law, *but it is an effort to obtain another and independent judgment* which will destroy the effect of the former judgment. As the present action is a collateral attack on the former judgment, it must be made to appear that such judgment was rendered without jurisdiction and is void.” (Emphasis ours.)

Later, in *Henderson v. Towle*, 23 Ariz. 377, 382, 203 P. 1085 (1922) the Court clarified the subject further:

“As the action is not brought for the sole purpose of impeaching or overturning the former judgment, but has also for its object an independent relief or result, the attack made herein upon the former judgment is a collateral one.”

Under the principle of collateral estoppel a judgment *precludes* the relitigation in another action of a specific question litigated and determined by and essential to the first action. This is not a new theory but is well founded in the law. *Cromwell v. Sac County*, 94 U.S. 351 (1877).

3. Conditional Vendee Jacobs Is Owner under Any Interpretation.

Appellee finds solace in the conflict of law theory that the question of ownership must be determined by the law of the State of Arizona and even if determined by the law of the State of Iowa, ownership in this particular instance is in C & P. This argument is completely superfluous because the fact of ownership at this point is undisputed as Appellant has maintained in their opening brief and in this reply brief. Assuming *arguendo* that the question of ownership can be litigated in this action (which Appellant vehem-

mently denies) then Appellee again is out of step. In Appellant's opening brief we directed the Court's attention to *Ruby v. United Sugar Co. S.A.*, 46 Ariz. 535, 109 P.2d 845 (1941) and to the various code sections of Iowa and again to *Hartman v. Norman*, 253 Iowa 694, 112 N.W.2d 374 (1962) which case construes the Iowa conditional sale statute and the purpose of its enactment.

Appellee should be well aware that public policy would dictate that a conditional vendor retains title only as security for the purchase price and they should have been well acquainted with the recent holding in *Herman v. Anacostia Chrysler-Plymouth, Inc.*, 350 F.2d 781 (1965) (Circuit Court of Appeals for the District of Columbia). In *Herman* the defendant was the seller of a vehicle under a conditional sale contract with the usual reservation of title clause. It was, therefore, alleged in the complaint that this defendant seller was the "owner" at the time of the accident. The Circuit Court of Appeals for the District of Columbia quickly disposed of that issue as follows (at page 783):

"To the extent reliance is now placed upon a clause in the conditional sales contract which reserved title to the seller, we read the instrument as providing *only a typical means of achieving security for the unpaid balance of the agreed purchase price.*" (Emphasis ours.)

To contend, as Appellee does, that this conditional sales contract places ownership in C & P is to completely ignore the obvious, recognized, common everyday business method of "achieving security for the unpaid balance of the agreed purchase price." Plaintiff in the instant case attempts to use the conditional sales contract as a shield when in the normal course of events public policy dictates that the

conditional sales contract should not shield the person who has the actual control of the automobile in question even though the seller holds title as security for the payment of the purchase price. *Herman* also disposes of Appellee's other contention when he quotes § 28-130, Arizona Revised Statutes, that statute defines "owner". By some verbal gymnastics Appellee tries to construe § 28-130, Arizona Revised Statutes, in favor of Appellee. This code section is identical with the code provision found in *Herman, supra*, and does not by any stretch of the imagination impute ownership in C & P. To the contrary the statute is unambiguous and should be read in its entirety for it gives the conditional vendee (Jacobs) the right to immediate possession and although C & P may have a right to use it under a lease agreement the lease agreement does not control § 28-130, A.R.S. It is but a collateral agreement between C & P and Jacobs.

4. The Jenkins Decision Is Limited to an Owners Policy Because A.R.S. § 28-1170B, the Arizona Financial Responsibility Act, Directs Itself Only to an Owners Policy.

Appellant feels that its argument in its opening brief (pp. 14-19) clearly establishes this principle and will not argue additionally herein. However, Appellant will point out that *Jenkins v. Mayflower, supra*, and the additional case cited by Appellee in its brief at page 19, *Wildman v. Government Employees' Ins. Co.*, 48 Cal.2d 31, 307 P.2d 359 are both cases concerned with "Owners" insurance policies.

Appellee requests this Court to "rewrite" the insurance policy in the instant case (Appellee's brief p. 19). What it is actually asking this Court to do is to judicially rewrite the Financial Responsibility Law of Arizona (A.R.S. § 28-1170). This request, of course, should not be granted.

CONCLUSIONS

In a collateral proceeding Appellee has attempted (and in the trial court succeeded) to convince this Court that the complaint in the instant case comes within the purview of *Jenkins v. Mayflower, supra*. In this regard Appellee contends (a) that the policy issued by the Appellant Travelers Insurance Company to its insured Colonial & Pacific Frigidways is or as Appellee would like to have it read an "owner's policy" and (b) even though it is a "non-owner's type policy" Appellee suggests that this Court rewrite the contract between the parties and if all that fails then Appellee contends (c) that it can re-litigate the issue of ownership in this case when that issue has already been determined and adjudicated in Cause No. 147641, *McElroy v. Trujeque and Jacobs*, Maricopa County Superior Court, Arizona. Appellee contended to the trial Judge that this was another *Jenkins* situation. When the trial court rendered judgment in favor of Appellee it must have been persuaded by Appellee's reference to *Jenkins*.

It is respectfully submitted for the reasons set forth in the opening brief of Appellant supplemented by this reply brief that this Court should reverse the judgment of the trial court and direct the granting of Travelers' motion for summary judgment.

Respectfully submitted,

KRAMER, ROCHE, BURCH & STREICH

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Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DANIEL CRACCHIOLO



No. 20183

In the

United States Court of Appeals

for the Ninth Circuit

THE TRAVELERS INSURANCE COMPANY

and

THE TRAVELERS INDEMNITY COMPANY,

Appellant,

vs.

REAN WILLIAM McELROY, JR.,

Appellee.

Brief for the Travelers Insurance Company

and

The Travelers Indemnity Company

FILED

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FRANK H. SCHMIDT, CLERK

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No. 20183

In the

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THE TRAVELERS INSURANCE COMPANY	}
and	
THE TRAVELERS INDEMNITY COMPANY,	
vs.	
REAN WILLIAM MCELROY, JR.,	

Appellant,
Appellee.

Brief for the Travelers Insurance Company
and
The Travelers Indemnity Company

OPINION BELOW

There is no opinion reported below.

BASIS FOR JURISDICTION

Jurisdiction of the District Court was based upon Section 1332 of Title 28, U.S.C. (78 Stat. 445). Appellant (defendant below) is a corporate citizen of the State of Connecticut. Appellee is a citizen of the State of Arizona. The amount in controversy is One Hundred and Five Thousand Dollars (\$105,000.00), exclusive of interest and costs (T.R. p. 2).

The Court of Appeals has jurisdiction to review the judgment of the District Court under Section 1291 of Title 28, U.S.C. (72 Stat. 348).

STATEMENT OF THE CASE

On September 10, 1962, Colonial and Pacific Frigidways, Inc., (hereinafter referred to as C & P) as seller, and Donald L. Jacobs, (hereinafter referred to as Jacobs) as buyer, executed in the State of Iowa a conditional sales contract for the sale of a White Freightline Tractor (p. 5—Jacobs' deposition; p. 7 Jacobs' deposition—marked as Exhibit No. 1 for identification).

On the same date Jacobs and C & P entered into a lease agreement whereby Jacobs leased his newly acquired tractor to C & P (p. 8 Jacobs' deposition—marked as Exhibit No. 2 for identification). The relationship was then as follows: Jacobs was lessor and C & P was lessee. C & P, as lessee of the tractor, agreed to pay Jacobs, the lessor, for the C & P business use of his tractor 72% of the gross receipts on westbound loads and 85% of the gross receipts on eastbound produce loads (Paragraph 4 of Lease Agreement). It should be pointed out at this juncture that C & P is a transportation company handling frozen and refrigerated products. Meat products were picked up in the midwest and transported to the west coast. On return trips produce was hauled to the midwest (ps. 11-12 Jacobs' deposition). All expenses incidental to the operation of said motor vehicle, including the purchase of collision insurance, was a cost to be borne by the lessor Jacobs (Paragraph 6 of Lease Agreement). In addition, the lessor agreed to hire certain personnel, subject to C & P's approval, to assist the lessor in driving said motor vehicle.

Simultaneously with the execution of said Lease Agreement, defendant Travelers Insurance Company (hereinafter referred to as Travelers) issued its comprehensive automobile liability policy No. RSLA 4325488 to C & P, the lessee, for a policy period commencing on September 10, 1962, and terminating on September 10, 1963 (T.R. 46-63).

The policy was written on defendant's Form C 9444 Ed. April, 1955, and Form 4050-A entitled Receipts Basis—Truckmen (Form A) (T.R. 58 59). The pertinent provisions of the Receipts Basis—Truckmen policy provided, among other things, as follows:

“It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability, for Automobile Medical Payments and for Property Damage Liability applies with respect to all owned automobiles and hired automobiles, and the use, in the business of the named insured, of non-owned automobiles, subject to the following provisions:

1. Definition of Insured. As respects such insurance, Insuring Agreement III, Definition of Insured, is replaced by the following:

With respect to the insurance for Bodily Injury Liability and for Property Damage Liability the unqualified word ‘insured’ includes the named insured and also includes any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission, and any executive officer of the named insured with respect to the use of a non-owned automobile. The insurance with respect to any person or organization other than the named insured does not apply: . . .

“(d) with respect to any hired automobile, to the owner or any lessee of such automobile, or to any agent or employee of such owner or lessee, if the accident occurs (1) while such automobile is not being used exclusively in the business of the named insured and over a route the named insured is authorized to serve by federal or public authority, or (2) after arrival of the automobile at its destination under a single-trip contract which does not provide in writing for the return trip of the automobile;

(e) with respect to any non-owned automobile, to any executive officer if such automobile is owned by him or a member of his household; . . .”

Thereafter Jacobs, the lessor, employed Donald Trujeque as his employee to assist him in driving the tractor and paid him a sum certain per trip plus expenses while in route (P. 9 Jacobs’ deposition; p. 26 Trujeque’s deposition).

On December 22, 1962, Jacobs, the lessor, and Trujeque, his employee, had come to Phoenix, Arizona, in order to spend the Christmas holidays with their respective families. The tractor and trailer were empty of merchandise during this period. Jacobs had previously delivered a load of merchandise to the west coast and was between trips (P. 23 Jacobs’ deposition).

On December 22, 1962, Trujeque was permitted by Jacobs to take the tractor, without the trailer attached thereto, to his house to clean it up (P. 20 Jacobs’ deposition). Trujeque took the tractor to his home and washed it the following morning which was December 23, 1962, and in addition to washing it had it serviced (P. 13 Trujeque’s deposition). On the night of December 23, 1962 Trujeque and the plaintiff McElroy, an acquaintance of Trujeque, went in the tractor to pick up Trujeque’s brother (P. 15 Trujeque’s deposition). As they were returning to Trujeque’s house, an accident occurred in which the plaintiff was injured. The plaintiff, McElroy, was not known by Jacobs nor was he employed by Jacobs in any capacity (P. 16 Trujeque’s deposition; P. 20 Jacobs’ deposition). Thereafter, plaintiff filed an action (Cause No. 147641) in the Superior Court of Maricopa County, Arizona, naming as defendants Trujeque and Jacobs (T.R. 34-36). Travelers insured C & P was not a party to that lawsuit (T.R. 34-36). The Complaint alleged, among other things, as follows:

"That on or about the 23rd day of December, 1962, at approximately 8:40 P.M., defendant, MIKE E. TRUJEQUE, was driving a 1957 Freight-Way truck-tractor in a northerly direction on North 51st Avenue in the vicinity of the 3600 block in the City of Phoenix, Arizona; that said truck-tractor was, at said time, *owned by Defendant, DON JACOBS*, and that defendant, MIKE E. TRUJEQUE, was then and there operating said truck-tractor as the agent on behalf and with the consent, permission and authority of the owner, defendant *DON JACOBS*." (Emphasis ours.)

Plaintiff's theory in Cause No. 147641 as against Jacobs was pursuant to the doctrine of respondeat superior in that Trujeque was the agent of the owner Jacobs at the time of the accident in question. Trujeque failed to file an appearance in plaintiff's action, and a default judgment in the sum of \$105,000.00 was entered on May 20, 1963, against Trujeque (T.R. p. 33). That action is still pending against Jacobs, and no judgment has ever been taken as against Jacobs as of the date of this brief.

On December 5, 1963, Cause No. 4961 was filed by plaintiff against Travelers Insurance Company in the District Court of the United States in and for the District of Arizona. That Complaint (T.R. 1 and 2), *inter alia*, alleged as follows:

"That prior to the 23rd day of December, 1962, the defendants had issued to Colonial & Pacific Frigidways, Inc., a policy of insurance in which the defendants agreed to insure the said Mike E. Trujeque against any liability for bodily injuries which should arise out of the ownership, maintenance or use of the aforementioned 1957 Freight-way truck; said policy was in full force and effect and covered the use of said vehicle by Mike E. Trujeque on the 23rd day of December, 1962."

Travelers answered said Complaint on January 28, 1964 (T.R. 5) denying all material allegations thereto. Thereafter depositions were taken; and on December 16, 1964, Travelers filed a Motion for Summary Judgment (T.R. 15-16). Plaintiff McElroy replied to defendants' Motion for Summary Judgment and filed a cross-motion for summary judgment on January 7, 1965. Oral argument was had thereon; and the lower court issued an order on March 2, 1965, granting plaintiff's cross-motion for summary judgment (T.R. 38). Thereafter and on March 5, 1965 defendants filed a Motion for Reconsideration (T.R. 39). The court denied the Motion for Reconsideration and entered formal judgment against Travelers on March 29, 1965 in the amount of \$10,000.00 plus interest (T.R. 40). This appeal followed.

QUESTION PRESENTED

Whether the Traveler's policy issued to the insured provides coverage, either by the policy provisions therein or by operation of law, when the vehicle leased to the insured is not being used by the insured or in the business of the insured?

SUMMARY OF THE ARGUMENT

Traveler's insurance policy issued to Colonial & Pacific by its very terms did not afford coverage to Trujeque at the time of the accident in question. The Arizona Financial Responsibility Act does not nor was it intended to apply to a policy of insurance issued to a non-owner.

ARGUMENT

- 1. The policy of insurance issued to C & P by its very terms is not applicable to Trujeque and did not afford him coverage at the time of the accident in question.**

THE VEHICLE WAS NOT OWNED BY C & P AT THE TIME OF THE ACCIDENT.

It is undisputed that this motor vehicle was not owned by C & P at the time of the accident. When plaintiff obtained his default judgment against Trujeque in Cause No. 147641 he alleged (T.R. 34) as follows:

"That on or about the 23rd day of December, 1962, at approximately 8:40 P.M., defendant MIKE E. TRUJEQUE, was driving a 1957 Freight-Way truck-tractor in a northerly direction on North 51st Avenue in the City of Phoenix, Arizona; that said truck-tractor was, at said time, *owned by Defendant, DON JACOBS*, and that defendant, MIKE E. TRUJEQUE, was then and there operating said truck-tractor as the agent on behalf and with the consent, permission and authority of the *owner, defendant DON JACOBS*." (Emphasis ours.)

The above allegation by plaintiff in his Complaint filed in the Superior Court of the State of Arizona was the theory under which a judgment in the amount of \$105,000.00 was rendered. The fact of ownership became merged in the judgment rendered against Trujeque.

On September 10, 1962 Jacobs purchased from C & P a tractor truck¹ for a total price of \$14,309.17. He paid \$3,500.00 to C & P as down payment and obligated himself by contract to pay the balance in certain monthly installments until the full purchase price was paid.

1. C & P, as seller and Jacobs, as buyer executed in Iowa a conditional sale contract wherein Jacobs was purchaser and C & P was seller. See Jacobs' deposition, page 7 and Exhibit No. 1 marked for identification.

As to the date of purchase Jacobs testified as follows:
(P. 5 Jacobs' deposition)

"When did you buy this truck from Colonial & Pacific Frigidways?

A. Do you want the exact date on this?

Q. As near as you can recall, yes.

A. The 10th day of September, 1962."

In obtaining the default judgment against Trujeque, plaintiff at all times asserted ownership of the truck in Jacobs. In their argument to the court on their cross-motion for summary judgment they contended that C & P was the owner of the truck in question.

The parties having executed a contract in the State of Iowa for the purchase and sale of said truck are thereby bound by Iowa law. *Ruby v. United Sugar Co. S.A.*, 56 Ariz. 535, 109 P.2d 845 (1941).

Applying the Arizona rule regarding conflict of laws, the question of ownership must be resolved by the rule of *lex loci contractus* which is the State of Iowa in the instant case. *Ruby v. United Sugar Co. S.A.*, *supra*. Since October 1, 1953, Iowa has had in effect a Certificate of Title Law. Material hereto, subsection 2 of section 321.45, Code of Iowa, 1962 provides:

"Except as provided in section 321.50 and except for the purpose of section 321.493 no person shall acquire any right, title, claim or interest in or to any vehicle subject to registration under this chapter from the owner thereof except by virtue of a certificate of title issued or assigned to him for such vehicle or by virtue of a manufacturer's or importer's certificate delivered to him for such vehicle; nor shall any waiver or estoppel operate in favor of any person claiming title to or interest in any vehicle against a person having possession of the certificate of title or manufacturer's or importer's certificate for such vehicle for a valuable

consideration. Except as provided in section 321.50 and except for the purpose of section 321.493 no court in any case at law or equity shall recognize the right, title, claim or interest of any person in or to any vehicle subject to registration sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued or assigned in accordance with the provisions of this chapter."

Section 321.493 Code of Iowa, 1962, commonly called the consent statute, or the Owner's Responsibility Law, provides:

"In all cases where damage is done by any motor vehicle by reason of negligence of the driver, and driven with the consent of the *owner*, *the owner* of the motor vehicle shall be liable for such damage.

"A person who has made a bona fide sale or transfer of his right, title, or interest in or to a motor vehicle and who has delivered possession of such motor vehicle to the purchaser or transferee shall not be liable for any damage thereafter resulting from negligent operation of such motor vehicle by another, but the purchaser or transferee to whom possession was delivered shall be deemed the owner. The provisions of subsection 2 of section 321.45 shall not apply in determining, for the purpose of fixing liability hereunder, whether such sale or transfer was made." (Emphasis ours.)

The first paragraph of the consent statute has been a part of the Iowa statutory law in substantially its present form since 1919. The second paragraph in its present form was added to this statute in 1955 by section 8, Chapter 157, Acts of the Fifty-sixth General Assembly.

Cases decided before the second paragraph in section 321.493 was enacted held that proof of vehicle registration

made a prima facie case of ownership in the registrant. The registration created an inference of ownership. Nevertheless, the same cases declared the inference could be rebutted by evidence. Accordingly, registration did not conclusively establish ownership. *Sexton v. Lauman*, 244 Iowa 570, 57 N.W.2d 200 (1953); *Bash v. Hade*, 245 Iowa 322, 62 N.W.2d 180; *Craddock v. Bickelhaupt*, 227 Iowa 202, 288 N.W. 109 (1939).

Hartman v. Norman, 253 Iowa 694, 112 N.W. 2d 374 (1962) which was decided since the amendment to section 321.493 construes the amendment so as to leave no doubt that it was designed to relieve a bona fide seller from liability from the negligence of his transferee occurring subsequent to the transfer. In *Hartman* an automobile driven by one defendant was at the time of the accident of record in the name of the other defendant. The plaintiff sued the owner of record as well as the driver. The owner of record urged as a defense that prior to the collision it had made a bona fide sale and delivery of possession of the vehicle to the driver. The owner of record was a licensed motor vehicle dealer. The accident occurred seven days after the purported sale and delivery. The court stated:

“We can think of no purpose in the enactment of what is now the second paragraph of section 321.493 other than to cover situations such as we have in the case before us. The statute is definite and specific. It provides that a person who has made a bona fide sale and who has delivered possession to the purchaser shall not be liable for any damage thereafter resulting from negligent operation by another. It also provides that subsection 2 of section 321.45 (the provision for proof of ownership by certificate of title) shall not apply in determining, for the purpose of fixing liability, whether such sale was made. The question under this statute is not who may own the vehicle or have a lien according

to the county records. It is not who may owe for the purchase price or how the indebtedness is evidenced. If there was a bona fide sale and delivery of possession, the statute relieves the seller from liability for subsequent negligence of the operator . . . *In the case before us the uncontradicted evidence shows that defendant Coy by written instrument agreed to purchase the car in question. There was a bona fide sale. The down payment was made. Possession was delivered. Coy took and retained possession. Under the statute he was the owner for the purpose of determining liability. Under the statute defendants were not liable.*" (Emphasis ours.)

Likewise, in the instant case Jacobs agreed to purchase the tractor by executing a written contract. He paid \$3,500.00 down and took and retained possession of the tractor.

Judge Graven of the United States District Court for the Northern District of Iowa in *Federated Mutual Implement & Hardware Insurance Co. v. Rouse*, 133 F. Supp. 226 (1955) held that an automobile dealer who had purchased a used car and resold it under a conditional sales contract was not an owner within Iowa's Owners' Responsibility Law, even though he had failed to comply with Iowa Motor Vehicle Certificates of Title Act and had failed to provide for a new certificate.

It is respectfully asserted that the facts, the law and the documentary evidence in the record establish beyond any doubt that C & P was not the owner of the tractor at the time of the accident.

TRAVELER'S POLICY ISSUED TO C & P BY ITS VERY TERMS EXCLUDES COVERAGE TO TRUJEQUE IN THIS CASE.

Travelers' liability policy issued to C & P (T.R. 58-59) provides, *inter alia*, as follows:

“It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability, for Automobile Medical Payments and for Property Damage Liability applies with respect to all owned automobiles *and hired automobiles, and the use, in the business of the named insured, of non-owned automobiles*, subject to the following provisions:

“. . . The insurance with respect to any person or organization other than the named insured does not apply: . . .

“(d) with respect to any hired automobile, to the owner or any lessee of such automobile, or to any agent or employee of such owner or lessee, *if the accident occurs (1) while such automobile is not being used exclusively in the business of the named insured . . .*

“(e) with respect to any non-owned automobile, to any executive officer if such automobile is owned by him or a member of his household; . . .” (Emphasis ours.)

A court cannot and should not do violence to the plain terms of a contract. However, the lower court by granting plaintiff’s cross-motion for summary judgment in effect either disregarded entirely the provisions of the policy or rewrote the contract for the parties. This it cannot do. In situations in which reasonable interpretation favors the insurer and any other would be strained and tenuous, no compulsion exists to torture or twist the language of the contract. As stated by the California Supreme Court in *Continental Casualty Co. v. Phoenix Construction Co.*, 296 P.2d 801, 806, 46 Cal. 2d 423 (1956):

“An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected.”

The Arizona Supreme Court has decided that an unambiguous contract *must* be interpreted according to the terms set forth therein. *City of Phoenix v. Tanner*, 161 P.2d 923, 63 Ariz. 278 (1945); *Galbraith v. Johnston*, 373 P.2d 587, 92 Ariz. 77 (1962).

It is well established in Arizona that an employee who has abandoned his employment and is engaged in personal and private affairs at the time of the accident is not acting within the scope of his employment. *Peters v. Pima Mercantile Co., Inc.*, 42 Ariz. 454, 27 P.2d 143 (1933); *Otero v. Soto*, 34 Ariz. 87, 267 P. 947 (1928); *Johnston v. Hare*, 30 Ariz. 253, 241 P. 546 (1926). Trujeque was not acting within the scope of his employment by Jacobs at the time of this accident so as to bring him within the plain terms of the policy. The undisputed facts show that Trujeque was using the tractor-truck solely for his own personal use at the time of the accident in that he had picked up his brother [who was not employed by Jacobs or C & P] and was taking him to his home. (P. 15 Trujeque's deposition). In no wise could this be construed to be operation of the truck-tractor "in the business of the named insured" C & P which contractually dictates coverage under the policy.

As evidenced by the above insurance policy, C & P *fully* insured its interest in the vehicle when it was operating for and in the business of C & P. As is obvious, C & P's insurance coverage was entirely and completely commensurate with its obligation to compensate the owner for the business use thereof by C & P. In other words, C & P fully insured the tractor-truck when it was being used in the business of C & P. A policy provision requiring that a vehicle be used "in the business of the named insured", is not a restriction because it offers full coverage to all persons driving said vehicle while said vehicle is being used for the benefit of the named insured. If the vehicle is being

used for any other purpose then coverage is not afforded to the driver under this type of policy whether that driver be Jacobs, Trujeque or any other person.

2. A non-owner lessee does not come within the purview of the Arizona Financial Responsibility Act when the leased vehicle is not being used in the business of the insured lessee.

The Financial Responsibility Law of Arizona provides, *inter alia*, as follows: (A.R.S. § 28-1170)

“B. The *OWNER'S POLICY* of liability insurance must comply with the following requirements:

“1. *IT* shall designate . . .

“2. *IT* shall insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured, against loss . . .” (Emphasis ours.)

Since the intention of the legislature embodied in a statute is the law, the fundamental rule of construction to which all other canons of construction are subordinate, is that the court shall, by all aids available ascertain and give effect to that legislative intent. *Valley National Bank of Phoenix v. Apache County*, 57 Ariz. 459, 114 P.2d 883 (1941); *Keller v. State*, 46 Ariz. 106, 47 P.2d 442 (1935); *State v. McEuen*, 42 Ariz. 385, 26 P.2d 1005 (1933); *Payne v. Knox*, 94 Ariz. 380, 385 P.2d 514 (1963).

When the language of a statute is plain and unambiguous, there is no occasion for construction. *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952); *Church v. Collier*, 71 Ariz. 353, 227 P.2d 385 (1951); *State v. Airesearch Mfg. Co.*, 68 Ariz. 342, 206 P.2d 562 (1949). And effect must be given to its obvious meaning. *Parrack v. Ford*, 68 Ariz. 205, 203 P.2d 872 (1949); *Millett v. Frohmiller*, 66 Ariz. 339, 188 P.2d 457 (1948).

It is well established that in the judicial construction of legislation, words used will be given their usual, natural, plain, ordinary, and commonly understood meaning. *Kuts-Cheraux v. Wilson*, 71 Ariz. 461, 229 P.2d 713 (1951), reheard 72 Ariz. 37, 230 P.2d 512 (1951).

It can hardly be asserted that the above statute is ambiguous or that it by some form of osmosis incorporates therein the tractor truck at the time of this accident.

The Arizona Legislature in enacting this law manifested its intention that it apply *ONLY* to an *owner's policy* in the clearest of language. The *IT* in paragraphs 1 and 2 refers plainly to "*THE OWNER'S POLICY*" and any other construction would be antithetical to the plain and unambiguous language used therein.

A.R.S. § 28-1170 was amended by the Arizona Legislature in 1961 (Ch. 94, § 4). However, subparagraph B including 1 and 2 thereunder were not changed either in substance or in form. In fact, the only changes brought about by the amendments were in (a), (b) and (c) under paragraph 2 which raised the limits of coverage required. It is evident that had the legislature desired to extend this statute to include hired or non-owned motor vehicles it could readily have done so by including the non-owner policy with the existing "owner policy". This it did not do and therefore it is basic and fundamental that the Courts will not usurp this prerogative of the legislature.

The identical issue involved in this appeal was considered by the Circuit Court of Appeals in *Clarke v. Harleysville Mut. Casualty Co.*, 123 F.2d 499 (4th Cir., 1941) to which the Appellant respectfully directs this Court's attention. The Court stated as follows: (at page 500)

"The only question with which we need concern ourselves then is: Does a non-ownership policy come

within the purview of this Statute so as to compel the inclusion of the Omnibus Coverage Clause as a part of the policy?"

In its decision the Court decided the above defined issue in the negative and went on to say at page 502:

"We have probed the language of the statute in question carefully, taking into account all the imponderable connotations which cluster around the words used and are suggestive of the legislative intent. *Having done so, we are unable to find any indication that the Legislature intended to make paragraph two of the statute embrace non-ownership policies. On the contrary, the plain and unambiguous language of the statute rebuts any such inference.* It is the duty of the court to construe the statute as written and not indulge in interesting speculations as to what the statute might have been but was not. . . . we cannot ignore what appears to have been a crisp legislative distinction expressed in terms that are anything but uncertain. We sit, after all, as an appellate court, not as an ancient oriental cadi, dispensing a rough and ready equity according to the dictates of his unfettered discretion." (Emphasis ours.)

As pertains to the Arizona statute not only did the Arizona legislature decline to amend to include a non-owner policy but in addition thereto it did not amend or delete A.R.S. § 28-1172 which specifically EXCLUDES a non-owner from this chapter dealing with the Uniform Motor Vehicle Safety Responsibility Act. Section 28-1172 states as follows:

§§ 28-1172. Chapter not to affect other policies.
A. This chapter shall not be held to apply to or affect policies of automobile insurance against liability which are required by any other law of this state, and such policies, if they contain an agreement or are endorsed

to conform with the requirements of this chapter, may be certified as proof of financial responsibility under this chapter.

“B. This chapter shall not be held to apply to or affect policies insuring solely the insured named in the policy against liability resulting from the maintenance or use by persons in the insured’s employ *OR ON HIS BEHALF OF MOTOR VEHICLES NOT OWNED BY THE INSURED.*” (Emphasis ours.)

Section 28-1172, *supra*, makes it abundantly and categorically clear that no coverage was extended under the facts of this case to Trujeque who was not at the time operating the leased vehicle in the business of the insured C & P.

The record is gorged with the fallacious argument that Trujeque did or did not have the express or implied permission of Jacobs and/or C & P to operate the tractor truck at the time of the accident.

This argument is based upon paragraph 2 of the Financial Responsibility Law of Arizona, *supra*. To juxtapose this permission argument with the above statute is to expose its spuriousness. The permission, express or implied, is of no moment in the instant case because the statute applies *ONLY* to an *Owner’s Policy*.

THE ARIZONA SUPREME COURT IN JENKINS v. MAYFLOWER INSURANCE EXCHANGE, 93 ARIZ. 287, 380 P.2d 145 (1963) DOES NOT EXTEND THE ARIZONA FINANCIAL RESPONSIBILITY ACT TO INCLUDE A NON-OWNER INSURED.

The lower court rendered no written opinion in this case. No reason was advanced by the court as to why the judgment was limited to \$10,000.00. Plaintiffs in their argument and briefs relied heavily on *Jenkins v. Mayflower*, *supra*. They evidently convinced the lower court that *Jenkins* was applicable and controlling as to a non-owner type

policy. The judgment, therefore, of necessity must have been rendered by applying the rule enunciated in *Jenkins* to a non-owner type policy. The lower court must have been persuaded in reading *Jenkins* that the "omnibus clause" of an "owner's policy" must be incorporated as a matter of law in a non-owner type policy of insurance. The amount of the judgment was limited to \$10,000.00 evidently because the court felt that Trujeque was an additional insured under C & P's non-owner type policy and, therefore, Trujeque was entitled to be indemnified to the extent of the minimum amount of insurance coverage specified in § 28-1170(b)(2)(a). The omnibus clause in *Jenkins* is not germane to this case. If it were it would be a "short horse soon curried". Plaintiff adroitly argued the applicability of *Jenkins* to the facts in this case. *Jenkins* involved an *Owner's Policy*. The omnibus clause in *Jenkins* restricted the use of the vehicle if it was "operated by any member of the military or naval forces of the United States or any foreign country". *Jenkins* held that the "omnibus" in an *owner's policy* cannot be restricted and that a person who drives a car with the permission of its owner (express or implied) is an insured as a matter of law. *Jenkins* cannot be tortured to apply to a non-owner's type policy. The rationale in *Jenkins* is founded upon Public Policy. (380 P.2d 145, 146.)

"The California Supreme Court, in *Wildman v. Government Employees' Ins. Co.*, 48 Cal.2d 31, 39, 307 P.2d 359, 364, refused to allow an insurance company to set up a restrictive endorsement as a defense and applied an omnibus clause substantially similar to A.R.S. § 28-1170, subd. B(2), as follows:

'It appears that section 415 must be made a part of every policy of insurance issued by an insurer since the public policy of this state is to make *owners of motor vehicles* financially responsible to those in-

jured by them in the operation of such vehicles.'"
(Emphasis ours.)

Jacobs who may have given Trujeque permission to use the truck and who was the *owner* is clearly within the ambit of *Jenkins*. To extend *Jenkins* to cover C & P would be to judicially delete section 28-1172 and to judicially amend section 28-1170 B to include the term non-owner as well as owner.

CONCLUSIONS

1. The insurance contract issued to C & P is plain and unambiguous and therefore dictates coverage to the vehicle. The policy fully covered the vehicle when it was being used in the business of C & P. It is clearly established by the record that this vehicle was not being so used at the time of this accident.

2. The lease agreement; the conditional sales contract; the insurance policy; the statements of the parties; the plaintiff's original complaint; and the law, clearly establish that C & P did not own this vehicle at the time of the accident.

3. The Arizona Financial Responsibility Act applies only to an *Owner's Policy* and therefore is not applicable to this case.

Needless to say, when a timely appeal is taken from an appealable order granting summary judgment, the appellate court in reviewing must determine whether there is any genuine issue of material fact underlying the adjudication, and if not, whether the substantive law was correctly applied. *Koepke v. Fontecchio*, 177 F.2d 125 (C.A. 9th, 1949).

It is respectfully asserted that there is no genuine issue of material fact underlying the adjudication of this matter

and in that determination the District Court was correct. However, as has been set forth in the preceding argument the lower court erred in applying the substantive law to the undisputed facts.

In rectification thereof, it is asserted that this Court should reverse the District Court's order granting plaintiff's cross-motion for summary judgment. Further, since this reversal eliminates any basis for the denial of the defendant's motion for summary judgment, it is respectfully asserted that this Court should direct the granting of Travelers' motion for summary judgment. Authority for the above requested disposition is well established. *U. S. v. DeWitt*, 265 F.2d 393 (5 Cir., 1959) and *U. S. v. Toys of the World Club, Inc.*, 288 F.2d 89 (2d Cir., 1961).

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DANIEL CRACCHIOLO

In The
UNITED STATES COURT OF APPEALS
for the Ninth Circuit

MADELINE CURRY, ADMINISTRATRIX OF THE
ESTATE OF JACK CURRY, DECEASED,

Appellant,

VS.

FRED OLSON LINE, a corporation,
A/S GANGER ROLF, A/S BORG and
A/S BONHEUR,

Appellees.

APPELLANT'S REPLY BRIEF

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NO. 20182

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FRED OLSON LINE, a corporation,
A/S GANGER ROLF, A/S BORGA and
A/S BONHEUR,

Appellees.

APPELLANT'S REPLY BRIEF

In this Reply, we have endeavored to reduce Appellees' argument to what we conceive its basic contentions to be, and then reply to them. At the outset, we do not think that Appellees have in any real measure joined issue with us, or reached the basic question before the Court.

CALIFORNIA LABOR CODE SECTION 2803, UPON WHICH APPELLEES' ENTIRE ARGUMENT IS BASED, IS COMPLETELY IRRELEVANT TO THIS CASE.

After reading Appellees' brief, we find ourselves like Don Quixote, jousting with wind mills. Where is reality, and where is fiction? Where is fact, and where is fancy? For Appellees' entire argument is directed to non-existent propositions.

Injected into the case by Appellees is Labor Code Section 2803 which forms the basis for a tortuous argument that "want of ordinary or reasonable care" resulting in death is the standard to be employed in an industrial death case, which standard it is argued precludes application of the seaworthiness rule with its absolute liability impositions.

This provision of law is completely unrelated to our case. Section 2803 is part of a legislative scheme which must be read and applied in conjunction with the California Workman's Compensation Act, Labor Code Secs. 3201 *et seq.* It comes into play in only those employer-employee situations where the death is not covered by the Compensation Act, as where certain employees are excluded from coverage, or the employer has failed to provide insurance to cover work incurred injuries or deaths. An action for damages may then be brought under Sec. 2803. Such instances are minute in number. The vast majority of death cases arising in the employer-employee relationship are covered by the Compensation Act where the employer is liable even though wholly free from fault, but only for compensation.

That Section 2803 cannot apply in our case is self-evident. Ours is a situation where the decedent, if killed ashore, would have been covered by the state Workmen's Compensation Act, and since he was killed aboard a vessel in a state harbor, his widow's rights as against the decedent's employer are protected by the Longshoremen and Harbor Worker's Compensation Act, 33 U.S.C. Secs. 901 *et seq.*

But Appellant here seeks no remedy against her deceased husband's employer. She seeks redress from a *third party tort-feasor*, the Appellee shipowners, which right is expressly reserved to her by Section 33 of Title 33 U.S.C. She has asserted that right pursuant to the state enabling statute which provides the remedy, C. C. P. Sec. 377. The general maritime law of the United States provides the substantive basis for her claim and the rules which determine its disposition, including her right to assert the doctrine of unseaworthiness.

We find no need to repeat in any detail the argument of our opening brief or the cases there cited. Suffice, we argue that California courts presumably would construe Section 377 as did the Court of Appeals for the Third Circuit the New Jersey Act in *Skovgaard vs. The M/V TUNGUS* (3 Cir. 1958) 252 Fed. 2d 14, 1958 A.M.C. 619, p. 622,

"The conduct required to impose liability * * is not limited to that conduct embraced in the historical concept of negligence. The words ("wrongful act, neglect or default") encompass something more. * * * The seaman possesses the legal right to a seaworthy ship. Whenever

this legal right is infringed and harm results by reason of the ship being unseaworthy, a 'wrong' occurs, whether it be of omission or commission.
 * * * *Culpability is not necessary to constitute a wrong. It is the liability-creating quality of an act which makes it wrongful.*" (Our emphasis.)

It should now be evident that federal maritime law controls the substantive rights here being asserted. As we previously noted, Mr. Justice Brennan, speaking for the four dissenting judges said in *M/V TUNGUS vs. Skovgaard* (1958) 358 U. S. 588, p. 608,

"It is the federal maritime law that looks to the state law of remedies here, not the state law that incorporates a federal standard of care. * * * When the injured party seeks to enforce a 'state created remedy' for the breach of the federally defined duty owing to him, 'federal maritime law would be controlling.'"

That this is clearly the present state of the law we turn to Mr. Justice Whitaker's dissenting statement in *Goett vs. Union Carbide* (1960) 361 U. S. 340, p. 346,

" * * * The substantive legal rights and liabilities involved in this admiralty case are not in any true sense governed by West Virginia law, but rather, are within the full reach of exclusive admiralty jurisdiction and are to be measured by the standards of the general maritime law * * * as *remedially* supplemented by the West Virginia Wrongful Death statute. * *

"And when in a case encompassed by the terms of the State's Wrongful Death statute, admiralty 'adopts' such statute, it does so only to afford a *remedy* for a substantive cause of action created by the maritime law which, 'if death had not ensued', would have redressed it.

Justice Whitaker was one of the majority in *TUNGUS*. His views coupled with those of Justice Brennan for the dissenters are definitive of the matter absent a precise ruling in clarification of the original *TUNGUS* decision.

II

APPELLEES' ARGUMENT IS NOT CONCERNED WITH THE CALIFORNIA WRONGFUL DEATH ACT'S INCLUSION OF A SEAWORTHINESS CAUSE OF ACTION, BUT CLAIMS THAT DECEDENT'S NEGLIGENCE DISPOSES OF THE CASE, WHICH IS NOT THE FACT.

Further confusing the matter, Appellees have posed the wrong question to this Court. It is not, as Appellees would have it, "whether under the law of California, the heirs of a longshoreman found by the jury to have died as a result of his own negligence would be entitled to recover damages for his death on the ground of unseaworthiness", but rather whether the California Wrongful Death Act encompasses an action for death caused by unseaworthiness of a vessel, and whether a litigant who pleads such a count is entitled to have it determined on the merits.

Whether decedent was guilty of negligence is totally unrelated to the unseaworthiness question. It is settled law that a maritime tort action may proceed on two separate counts, negligence and unseaworthiness. *Balado vs. Lykes Bros.* (2 Cir. 1950) 179 Fed. 2d 943. The evidence may support recovery on one or both grounds, or none. *McCarthy vs. American Eastern Corp.* (3 Cir. 1949) 175 Fed. 2d 724.

But the considerations which support the theories may be at variance, as in a case like ours where the claim was made that the deck area was "slippery and unsafe to walk upon" causing decedent's fall. (Tr. p. 2). On a negligence count, proof of knowledge, or at least the opportunity to know of a dangerous situation, must be established against the shipowner to fasten liability upon him. Imposition of unseaworthiness requires no such proofs.

" * * * The shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. * * * There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. *What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence.* To hold otherwise now would be to erase more than just a page of history."

Mr. Justice Stewart writing the Court's opinion in *Mitchell vs. Trawler Racer Inc.* (1959) 362 U. S. 539, 550, 1960 A.M.C. 1503. (Our emphasis.).

In almost any maritime tort action, and particularly in a slip and fall case, like ours, the possibility of both negligence and unseaworthiness exists. *Krey vs. United States* (2 Cir. 1941) 123 Fed. 2d 1008, 1942 A.M.C. 19, and see *The Tangled Seine: A Survey of Maritime Personal Injury Remedies*, 57 Yale Law Journal 243, pp. 251-256. Cf. *Mahnich vs. Southern S. S. Co.* (1944) 321 U. S. 96.

There may be no negligence, but there may still be unseaworthiness. *Sulovitz vs. United States* (E.D. Pa. 1945) 64 F. S. 637, 1945 A.M.C. 1467, 1473, where such findings were expressly made. And there may be no negligence on the part of the shipowner coupled with contributory negligence of the injured worker proximately contributing to the accident, but there may still be unseaworthiness. Cf. *Holley, Admr. vs. S. S. MANFRED STANSFELD* (4 Cir. 1959) 269 Fed. 2d 317, 1959 A.M.C. 2189.

In the case at bar, assume that the shipowner was not negligent because it neither knew or had the opportunity to know of the slippery and unsafe condition. Assume, further that such condition existed. Assume further, that plaintiff was guilty of contributory negligence. The vessel owner could still be liable on the basis of unseaworthiness, predicated on the fact that there was in fact a slippery and unsafe condition which caused injury. Nothing more need exist to bring the unseaworthiness doctrine into play. This Court has so held.

" * * * It is now established law that a shipowner is liable to a stevedore loading its vessel if it be unseaworthy as to its decks by the presence thereon of sufficient oil or grease to make it slippery to one walking over it, and the stevedore is injured thereby. The liability exists although the shipowner has no knowledge of the presence of the oil or grease." *Yanow vs. Weyerhaeuser S. S. Co.* (9 Cir. 1957) 250 Fed. 2d 74, 1958 A.M.C.

516, p. 517. And see *Johnson Line vs. Maloney* (9 Cir. 1957) 243 Fed. 2d 293, 1957 A.M.C. 1138; *Mitchell vs. Trawler Racer Inc.*, *supra*; and *Alaska Steamship Co. vs. Petterson* (1953) 347 U. S. 396, affirming this Court, 205 Fed. 2d 478, 1953 A.M.C. 1405.

Turning now to our case: the presence of a slippery substance of sufficient quantity making an unsafe working place constitutes unseaworthiness. The only role that decedent's contributory negligence has in the case would be to reduce the recoverable damages according to the maritime tort rule of comparative negligence. *Holley, Admxc. vs. S. S. MANFRED STANSFLED*, *supra*.

It was manifest error by the District Court to grant a partial summary judgment for Appellees on the unseaworthiness count, and thereby deny Appellant a trial on the merits of such claim. *Cf. Jacob vs. City of New York* (1941) 315 U.S. 752.

III.

UNSEAWORTHINESS IS ACTIONABLE UNDER THE CALIFORNIA WRONGFUL DEATH ACT CONTRARY TO APPELLEE'S CLAIM THAT UNSEAWORTHINESS SOUNDS IN CONTRACT, AND THEREBY IS NOT ACTIONABLE.

Insofar as the California Wrongful Death Act covers only actions sounding in tort, no inhibition constrains an unseaworthiness cause. Appellees contend that such a claim is grounded in contract, and therefor is not actionable under the Act. Not so.

We discussed this point in our Opening Brief, pp. 25-26.

Although there is discussion in the cases that the right to a seaworthy vessel is an "incident of the seaman's contract", it is now settled beyond question that such right is a "relational" duty owed by the shipowner to the seaman (or longshoreman doing "seaman's work") and existing over and above strict contractual obligation.

The Supreme Court gave full answer to Appellees' contention in *Seas Shipping Co. vs. Sieracki* (1946) 328 U. S. 85, p. 93,

"Because rationalizing the liability as one attached by law to the relation of shipowner and seaman, where this results from contract, may have been thought useful to negative the importation of those common law tort limitations (contributory negligence, assumption of risk, negligence of a fellow servant) *does not mean, however, that the liability is itself contractual* or that it may not extend to situations where the ship's work is done by others not in such an immediate relation of employment to the owner. *That the liability may not be either so founded or so limited* would seem indicated by the stress the cases uniformly place upon its *relation*, both in character and in scope, to the *hazards* of marine service which unseaworthiness places on the men who perform it. * * *

"The hazards which maritime service places upon men who perform it, *rather than any consensual basis of responsibility*, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character." (Our emphasis.)

The shipowner's liability to seamen for unseaworthiness is rooted in their *relationship and the hazards of maritime service*, not in any contract between them, written or consensual. Unseaworthiness is a tort. Of that there can be no further question.

Sieracki gives the full and final answer to that proposition.

Other Courts have given like reply.

"If it be said that the New Jersey (Wrongful Death) Act provides redress for tortious conduct alone, we answer that providing an unseaworthy ship is a tort." *Skovgaard vs. M/V TUNGUS* (3 Cir. 1957) 252 Fed. 2d 14, 1958 A.M.C. 619, 623.

" * * * The breach of the obligation to furnish a seaworthy ship is a tort; and that is a result consonant with the historical attitude toward breaches of warranty, which until 1778 had to be sued in tort, and which may be still so treated if the distinction is important." *Strika vs. Netherlands Ministry of Traffic* (2 Cir. 1950) 185 Fed. 2d 555, 558, 1951 A.M.C. 84, 88.

" * * * We believe the West Virginia (Wrongful Death) Act incorporates the general maritime law of unseaworthiness in death actions involving maritime torts." *Union Carbide Corp. vs. Goett* (4 Cir. 1960) 278 Fed. 2d 319, 1960 A.M.C. 1125, 1130.

And this very Circuit appears to have disposed of the point here under discussion *sub silentio* in the case of *Rawson vs. Calmar Steamship Corp.* (9 Cir. 1962) 304 Fed. 2d 202, 1962 A.M.C. 2153. There a longshoreman's widow brought an action under Washington law against a shipowner on whose vessel her husband was killed, claiming both negligence and unseaworthiness when a winch cable ran wild crushing his head and causing instantaneous death. On the facts, the District Court found for the shipowner, and this Court affirmed.

However, it seems to have been accepted by both Courts that had there been liability, a verdict could have been found for plaintiff on either the ground of negligence or unseaworthiness. (The Washington statute, Revised Code of Washington, 4.20.010, in which state the case arose, provides for wrongful death actions "when the death of a person is caused by the wrongful act, neglect or default", and although it does not appear in the opinion, the briefs demonstrate that this was the remedial statute which authorized the action. Appellant's Brief, p. 24, states that the District Court considered the "unseaworthiness issue under Washington law.")

This Court said, 1962 A.M.C. p. 2157,

"But what of unseaworthiness? Assuming unseaworthiness and causation, the liability is absolute." (The Court cites *Sieracki vs. Seas Shipping Co.*, *supra*; *Mitchell vs. Trawler Racer*; and *Patterson vs. Alaska Steamship Co.*, *supra*, all of which we have cited and discussed in support of our position.)

It appears that not only is the breach of the warranty of unseaworthiness a tort, and that this principle has been so held or assumed by the Courts, but there are no meaningful contrary holdings.

Unseaworthiness, being a tort, is thereby actionable under the California Wrongful Death Act.

IV.

THE CALIFORNIA WRONGFUL DEATH ACT ENCOMPASSES ACTIONS BASED ON BREACH OF WARRANTY (ABSENT NEGLIGENCE) BUT SUCH CASES SOUND IN TORT.

Appellees contend that only negligence actions are cognizable

under "the applicable California statute."

This contention is not only not the fact, but Appellees have completely ignored any discussion of the controlling cases and principles of law involved.

Here, again Appellees' entire argument is predicated on their fallacious assertion that Labor Code Section 2803 controls this case, but we have pointed out that this section is neither the remedial statute on which our case proceeded, nor does it have anything to do with the matter at issue. Nor did the District Court consider that our unseaworthiness case involved anything other than an action under C. C. P. Sec. 377.

The Court below acted upon the basis of *Mortenson vs. Pacific Far East Lines* (N.D. Cal. 1956) 148 F. Supp. 71, 1956 A.M.C. 2275. A perusal of *Mortenson* demonstrates that C.C.P. 377 was all that was being construed. The injection of Labor Code Sec. 2803 by Appellees here is an attempt to make an argument that is obviously impossible if directed to C.C.P. Sec. 377.

So far as breach of warranty of fitness being the basis for a death action is concerned, there is no question. That has been decided by the California courts, *Gosling vs. Nichols* (1943) 59 Cal. App. 2d 442, 139 Pac. 2d 86; *Rubino vs. Utah Canning Co.* (1954) 123 Cal. App. 2d 18, 266 Pac. 2d 163, and by this Court itself in *Zellmer vs. Acme Brewing Co.* (9 Cir. 1950) 184 Fed. 2d 941. (See Appellant's Opening Brief, pp. 24-29.)

Appellees have studiously avoided a discussion of these cases and their holdings obviously because there is no answer that can give Appellees comfort. "In California an action for death based upon an implied breach of warranty is within the terms of the California Wrongful Death Statute." *Hinton vs. Republic Aviation Corp.* (S. D. N. Y. 1959) 180 F. Supp. 31, p. 37. Cf. *Greenman vs. Yuba Power Products Inc.* (1963) 59 Cal. 2d 57, 377 Pac. 2d 897.

Woxon vs. County of Kern (1965) 233 A.C.A. 462, 43 Cal. Rep. 481 is not apposite. That case went off on the limitations point. It is apparent that plaintiff there attempted to circumvent the Moratorium legislation enacted by the California Legislature in connection with actions against governmental mental institutions and attempted to plead a tortious death action in terms of contract. The Court held that C. C. P. 377 covered only tort claims. We have already demonstrated that a death action based on unseaworthiness is a tort.

Similarly, *Willey vs. Alaska Packers Assn.* (N.D. Cal. 1926) 9 Fed. 2d 937, 1926 A.M.C. 157 is inapplicable. The holding that the breach of a shipowner's duty to provide maintenance and cure to a seaman was not actionable under C. C. P. 377 could no longer hold under later decisions. The proper remedy is under the Jones Act, 46 U. S. C. Sec. 688. Cf. *Lindgren vs. United States* (1930) 281 U. S. 1930, 1930 A.M.C. 399.

The matter has been definitively settled contrary to *Willey* by the Supreme Court's decision in *Cortes vs. Baltimore Insular Line* (1932) 287 U.S. 367, 1933 A.M.C. 9. There the Court held that a shipowner's failure to provide medical care and cure to a seaman resulting in the latter's death was actionable under the Jones Act, 46 U. S. C. Sec. 688. Shipowner's counsel presented the same argument Appellees make here, 1933 A.M.C. p. 10,

"The argument is pressed upon us that the care owing to a seaman disabled while in service is an implied term of his contract, and that the statute cannot have had in view the breach of a duty contractual in origin for which he had already a sufficient remedy under existing rules of law."

Mr. Justice Cardozo replied for the Court, 1933 A.M.C., p. 11,

"We think the origin of the duty is consistent with a remedy *in tort*, since the wrong, if a violation of a contract, is also something more. The duty * * * is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties. For breach of a duty thus imposed, the remedy upon the contract does not exclude an alternative remedy built upon the tort."

Moreover, the entire sweep of modern legal expression favors the construction of breaches of implied warranty as causes sounding in tort, or something more, namely, an "enterprise Liability" where the liability of the supplier is "strict" and may be an entirely new cause of action, neither tort nor contract, but still actionable where death occurs under the appropriate wrongful

death Act. Cf. *Santor vs. A & M Karagheusian Inc.* (1965) 44 N. J. 52, 207 A. 2d 305.

Montgomery vs. Goodyear Tire & Rubber Co. (S.D. N.Y. 1964)

231 F. Supp. 447, was an action for wrongful death brought under the Death on the High Seas Act where the offending instrumentality was an alleged faulty blimp, the complaint being framed in terms of both negligence and breach of implied warranty of fitness. The Court says, 231 F. Supp. 447, p. 451,

" * * * We choose to examine the particular facts upon which the claim rests and so determine whether there was in truth a breach of implied warranty or negligent manufacture.

The Court continues, p. 453,

"Section 1 of the Death on the High Seas Act does not encompass negligence alone, for a breach of warranty is as much a breach of duty as it is a negligent act. * * *

These further pervasive comments appear, p. 454

"Moreover, the recent trend in personal injury and death cases based on warranty has been to treat the action as one in the nature of tort, ignoring contract considerations. * * * An action based on breach of implied warranty will lie under the Death on the High Seas Act."

Other recent cases adhering to the same views: *Weinstein*

vs. Eastern Airlines (3 Cir. 1963) 316 Fed. 2d 758, cert.den.

375 U. S. 940; *Middleton vs. United Aircraft Corp.* (S.D. N.Y.

1960) 204 F. Supp. 856; *George vs. Douglas Aircraft Co. Inc.*

(2 Cir. 1964) 332 Fed. 2d 73; *Goldberg vs. Killsmann Instrument*

Corp. (1963) 12 N.Y. 2d 432.

The foregoing opinions not only fortify our view that the California Wrongful Death Act supports an action based upon breach of warranty, they give full answer to Appellees' contention to the contrary. (Appellees' Brief, p. 27.)

V.

CONSIDERATIONS WHICH GOVERN A JONES ACT CASE ARE NOT APPLICABLE HERE.

All that can be extracted from the majority opinion in *Gillespie vs. United States Steel Corp.* (1964) 379 U.S. 148, 1965 A.M.C. 1, is that the Supreme Court chose to stand by its earlier decision in *Lindgren vs. United States* (1930) 281 U.S. 1930, 1930 A.M.C. 399, that in the event of a seaman's tortious death in state waters the case was covered by the Jones Act which occupied the field, and the case was to be decided solely on negligence considerations.

The incongruity of this express holding was pointed up by Justice Goldberg in his dissenting opinion, where he noted that an action for the death of a *longshoreman* could be brought under a State Wrongful Death Act on account of unseaworthiness occurring in state waters, and that "seamen and longshoremen currently recover for death on the high seas and injury suffered anywhere due to an unseaworthy vessel." (1965 A.M.C. pp. 14-15).

The relevance of *Gillespie* to our case is its tacit recognition that an action for unseaworthiness could be maintained under the Death on the High Seas Act, 46 U. S. C. Sec. 761 and far from

overruling that act's application to seamen (as Appellees would have it), it confirms it.

Analogous considerations support the conclusion that a state wrongful death act like California's requires a like construction.

Where the construction or application of state law in its maritime features is concerned, federal law controls. Mr. Justice Black expressed the rule in *Pope & Talbot vs. Hawn* (1953) 346 U.S. 406, 409, 1954 A.M.C. 1,

"His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a *state created remedy for this right, federal maritime law would be controlling*. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantive admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court." (Our emphasis.)

While it has long been true that a longshoreman is a seaman with respect to his right to call upon the protective admiralty doctrine of unseaworthiness, he is not a "seaman" within the *context of the Jones Act*. That statute governs situations of those who are "crew members" in relationship to their employers. It is an employer's liability act, pure and simple.

A longshoreman's remedy for injuries as against his employer is compensation under the Longshoreman's and Harbor Worker's Compensation Act, 33 U. S. C. Secs. 901 *et seq.* But in that area which encompasses *third party liability*, as in the case now before the Court, a longshoreman's substantive rights are determined by the federal maritime law, and this is so whether his claim is based on

negligence, or unseaworthiness, or both. *THE MAX MORRIS* (1890) 137 U. S. 1, *Seas Shipping Company vs. Sieracki, supra.*

The California courts recognize, as of right they must, the supremacy and controlling efficacy of the federal maritime law.

Intagliata vs. Shipowner's and Merchants Towboat Co. Ltd. (1945) 26 Cal. 2d 365, 159 P. 2d 1.

Reducing the argument to its basic essence we conclude that the state has supplied a remedy, the wrongful death act, by means of which the substantive maritime right of unseaworthiness is applied and enforced.

Dated at San Francisco on January 31, 1966.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VAN H. PINNEY

Of Attorneys for Appellant

